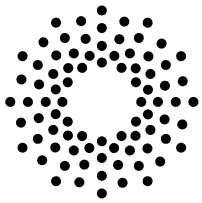

LONDON
METROPOLITAN
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GUILDHALL BUSINESS & LAW

The Barrie Guide to the Law of Contract 2020-2021
Volume Three

Barrie Goldstone
Head of the School of Law
London Metropolitan University

CONTENTS

PART ONE: MISREPRESENTATION

PART TWO: FRUSTRATION

PART THREE: MISTAKE

47. THE EFFECT OF AN OPERATIVE MISTAKE
48. CATEGORIES OF OPERATIVE MISTAKE
49. COMMON MISTAKE: THE MODERN CRITERIA
50. *RES EXTINCTA*
51. *RES SUA*
52. MISTAKE AS TO QUALITY
53. MEANING AND EFFECT OF A MUTUAL MISTAKE
54. UNILATERAL MISTAKES AS TO THE TERMS OF THE CONTRACT
55. UNILATERAL MISTAKES AS TO IDENTITY
56. RECTIFICATION OF MISTAKES IN DOCUMENTS
57. NON EST FACTUM (It is not my deed)

PART FOUR: LIQUIDATED DAMAGES

58. THE OLD LAW
59. THE NEW LAW

PART FIVE: UNLIQUIDATED DAMAGES

60. DEFINITIONS
61. THE RULE IN *ROBINSON v. HARMAN*
62. CAUSATION
63. CAUSATION AND LACK OF MITIGATION BY THE CLAIMANT
64. REMOTENESS: THE RULE IN *HADLEY v. BAXENDALE*
65. REMOTENESS: *VICTORIA LAUNDRY* - CLARIFICATION OR CONFUSION?
66. REMOTENESS: *THE HERON II* - CLARITY OR CONFUSION?
67. REMOTENESS: *JACKSON v. RBS* - PUTTING SEMANTICS TO REST?
68. *THE ACHILLEAS* REFINEMENT
69. REMOTENESS: POST-ACHILLES CASES
70. REMOTENESS: DENNING AND THE PIGS
71. GENERAL PRINCIPLES: COST OF CURE v. DIFFERENCE IN VALUE
72. DIFFERENCE IN VALUE
73. EXCEPTIONAL CASES: REINSTATEMENT DAMAGES
74. *RUXLEY v. FORSYTH*: REASONABLENESS AND PROPORTIONALITY
75. THE INTENTION OF THE CLAIMANT
76. RELIANCE LOSS: THE GENERAL RULE
77. BAD BARGAINS
78. SPECULATIVE DAMAGES: THE GENERAL RULE
79. RESTITUTIONARY/ DISGORGEMENT DAMAGES: GENERAL RULE
80. DAMAGES IN LIEU OF AN INJUNCTION
81. AN ACCOUNT OF PROFITS
82. NON-FINANCIAL LOSS: THE GENERAL RULE
83. DISTRESS CAUSED BY PHYSICAL INCONVENIENCE
84. CONTRACTS FOR ENJOYMENT
85. EXTENSION OF DAMAGES FOR DISTRESS
86. *FARLEY v. SKINNER* (No. 2) APPLIED
87. *FARLEY v. SKINNER* (No. 2) DISTINGUISHED
88. MITIGATION OF LOSS
89. BENEFITS ACCRUING
90. CONTRIBUTORY NEGLIGENCE
91. TAXATION
92. SUPERVENING EVENTS
93. LIMITATION ACT 1980

PART SIX: EQUITABLE REMEDIES

TUTORIAL QUESTIONS

Fordy v. Harwood 1999 (Full text)

PART ONE: MISREPRESENTATION

1 INTRODUCTION

1.1 When a statement is made to encourage someone to buy a product or services, this is known as a 'representation'. In many cases – especially where the contract is for the sale of goods and the representation amounts to a description of the goods – the representation will become a term of the contract (by virtue of the Sale of Goods Act 1979, s.13 or the Consumer Rights Act 2015, s.11). In that case, if the representation proves to be false, the victim may sue for breach of contract.

1.2 However, if the representation does not become a term of the contract (as may be the case when selling land or a business opportunity), the victim may still have a remedy for 'misrepresentation'. This is akin to the torts of negligence and deceit, and the remedies are correspondingly tortious in nature[1].

2 THE DEFINITION OF MISREPRESENTATION

2.1 A misrepresentation is an unambiguous false statement of fact which is made to induce someone to enter into a contract, and which does actually so induce them.

3 AN UNAMBIGUOUS STATEMENT

3.1 If the meaning of a statement is ambiguous and the representee simply misinterprets it, this will not normally give rise to a misrepresentation.

3.2 ***McInerny v. Lloyds Bank Ltd*. [1974] 1 Lloyd's Rep 246 (CA)**

McInerny wished to sell shares in a Portuguese company to Mackay provided that Mackay's bank would guarantee the payment. Mackay asked his bank to send the guarantee to McInerny. The bank wrote that because the transaction involved a foreign currency, they could not give such a guarantee under banking regulations, but could give an "irrevocable letter of credit" instead. McInerny presumed that this amounted to the same thing as a guarantee, and signed a contract with Mackay. Mackay defaulted on the payments, and McInerny discovered that the "irrevocable letter of credit" did not amount to an assurance of payment by the bank. He claimed that there had been negligent misrepresentation.

HELD: The bank was not responsible for the misinterpretation of its letter by the plaintiff, as on a reasonable construction the bank had not given the assurances he claimed.

"It seems to me that the bank manager's reply of October 5, 1967, can be criticized for its drafting, but not for the substance of what it said. It was so ill-drafted that Mr. McInerny thought it gave the assurance that was asked for… True his letter was so drafted that Mr. McInerny interpreted it as giving (the assurance). But the bank manager is not responsible for that interpretation. Nor did the bank manager know that Mr. McInerny would put that interpretation on it. Nor ought he to have known it.

"It would have been much better if he had explicitly refused to give the assurances requested. Then there would have been no misunderstanding: and Mr. McInerny would never have entered into the contract with Mr. Mackay. But that is not sufficient to make the bank liable.

"No man is to be made liable for not making his meaning clear. If it were so, few of us would escape condemnation. No man is to be made liable for not making his meaning clear. If it were so, few of us would escape condemnation." per Lord Denning at p.254

[1] The remedies for misrepresentation are discussed later.

4 THE PASSING OFF CASES

4.1 The issue of what constitutes an unambiguous misrepresentation has arisen in several cases concerning the tort of passing-off and breach of trademark. The claimants in these cases are not normally consumers who have actually been misled, but rather the manufacturers of certain products who allege that consumers *will be* misled by a rival manufacturer into thinking the products the claimant company are the same as those of the defendant company, thus depriving the claimant company both of profits and goodwill.

4.2 ***Chocosuisse Union des Fabricants Suisse de Chocolat & Lindt & Suchard v. Cadbury Ltd*. [1999] RPC 826 (CA)**

In 1994 Cadbury launched a new chocolate bar called "Swiss Chalet" with a picture of the Matterhorn and a Swiss chalet on the packaging. Chocosuisse, the association of Swiss-based chocolate manufacturers, claimed that Cadbury was misrepresenting and passing the product of as Swiss chocolate. Cadbury's contended, *inter alia*, that (i) there was no clear definition of Swiss chocolate, particularly since Lindt and Suchard did not themselves manufacture all their supposed 'Swiss' chocolate in Switzerland; and (ii) they had not, in any case, claimed that their chocolate was Swiss.

HELD: The technical definition of Swiss chocolate was precise enough to constitute a representation, meaning chocolate made according to Swiss food regulations and not containing vegetable fat or Cocoa Butter Equivalent. Furthermore, Cadbury had misrepresented their chocolate as being Swiss by the packaging and name.

4.3 ***British Broadcasting Corporation v. Talk Sport Ltd*. [2001] F.S.R. 6**

The BBC had the exclusive rights to broadcast 'live' radio commentaries of Euro 2000 matches — i.e., coverage from within the stadia where the matches were being played. Talksport, a commercial radio station, broadcast contemporaneous 'off-tube' coverage, which meant that the commentator watched the match on television with the sound down, and made up a commentary. As this meant there was no background noise, sound effects recordings taken from other matches supplied this. Talksport advertised these commentaries as being 'live'. The BBC claimed that this was a misrepresentation.

It was held that there was a misrepresentation here, even though every ten minutes or so the Talksport commentator pointed out that the match commentary was "unofficial" and was "courtesy of TV monitors".

"The evidence discloses a difference as to what is meant by "live" in this context. Does it mean, as the BBC evidence asserts, that the coverage is being broadcast at the same time as the event in question, and that the commentary is by someone watching the event with his own eyes? Or does it mean, as Talksport asserts, no more than that the commentary is contemporaneous with the event described, meaning that the commentator cannot stop and re-record what he is saying, whether or not present at the event that he is describing?

"I have little doubt that in the minds of ordinary radio listeners, in which I would include myself, a live commentary of the sporting event means one by a person present at the event which he is describing, and able with his own eyes to see what he is commenting upon." per Blackburne J. at p.5

4.4 ***GMG Radio Holdings Ltd v. Tokyo Project Ltd*. [2005] EWHC 2188**

The claimants (C) applied for an interim injunction to restrain the defendants (T) from using certain artworks in relation to compact discs or for the purposes of promoting certain musical events. C had operated a music business under the trade mark "HED KANDI" that covered dance music. The business comprised, *inter alia*, a compilation record album label, music events that took place at clubs and other similar venues. C had released a number of albums under the HED KANDI trade mark. The front cover of each of the albums bore the mark HED KANDI and artwork comprising the image of one or more women drawn in a pop-art style created by an artist.

T adopted the label TOKYO PROJECT and sought to reinvent the HED KANDI brand. At an event, T handed out flyers that bore artwork produced by the same artist who had worked for C. The flyers referred to the launch of an album. The cover of T's compact disc contained the words TOKYO PROJECT, and the background comprised a picture of a stylised woman.

The artwork was used in other promotional items, on T's website and on a series of advertisements and flyers advertising various events organised by T. C contended that the illustration on T's compact disc was similar to the artwork adopted by them for their compilation albums, and the use of the illustration would lead members of the public to believe that T's album was another album in the HED KANDI series.

HELD: The court refused the application. C had relied upon the general style or appearance of the artwork appearing on their compilation albums rather than upon a particular imitation of a "get-up". The general description of C's get-up, together with the fact that C's compact discs all bore the trade mark HED KANDI, had presented C with something of a challenge in seeking to establish that the get-up was distinctive specifically of its goods or services. Moreover, T's artwork had clearly carried the trade mark TOKYO PROJECT and that was very significant in considering whether or not their activities had constituted a misrepresentation that was likely to result in confusion and deception. The get-up itself was very difficult to define. The artwork for each of the recordings released by C was very different. Whilst C had shown that each cover had featured a stylised illustration, T had established that the style was not unique to C. Further, the compact discs and other aspects of C's business had always been sold under and by reference to the HED KANDI brand name.

The artwork produced by the artist was entirely original, albeit in the same pop-art style that he had previously adopted for C. Accordingly, on the evidence, C would have considerable difficulty in making good a claim in passing off at trial. The risk of deception and confusion occurring was relatively low. (2) The balance of justice came down firmly in favour of not granting the injunction sought. If T were permitted to continue to trade in the manner proposed, but C succeeded at trial, the damage to C was not likely to be very significant. Conversely, if an injunction was granted there would be a very substantial risk of substantial damage to T. That damage might be so severe that T's business would fail entirely.

4.5 ***Phones 4U Ltd. v. Phone4U.co.uk Internet Ltd*. [2006] EWCA Civ 244**

The internet company Phone4U was unable to convince the Court of Appeal that they were not misrepresenting themselves as being associated with the massively well-known (albeit now defunct) company Phones 4U, despite selling the same product and having virtually the same quirky name.

4.6 ***L'Oreal SA et al v. Bellure NV et al.* [2006] EWHC 2355**

L'Oreal is a manufacturer of high quality perfumes and other beauty products. Amongst its global brands are several perfumes such as *Tresor*, *Miracle*, *Anais Tremor* and *Noa*. Bellure manufactured much cheaper 'smell alike' perfumes, such as *Coffret d'Or, La Valeur, Pink Wonder and Nice Flower*, which were packaged in such a way as to give 'a wink of an eye' to L'Oreal's products. They also published comparison charts.

L'Oreal claimed that Bellure had infringed their trademark designs, and were passing off its products as being associated with L'Oreal.

It was held that whilst D's products took unfair advantage of L'Oreal's extensive marketing (which was itself an infringement of the Trade Marks Act 1994), there was no passing off infringement or misrepresentation in relation to the packaging or names such as would confuse the average member of the public into believing that a Bellure product was a L'Oreal product. The smell of the product, which was its essential feature, could not in itself amount to a misrepresentation as to its origins. The smell was not meant to disguise its true nature: it **was** its true nature.

4.7 ***Numatic International Ltd. v. Qualtex Ltd.*** **[2010] EWHC 1237 (Ch)**

Numatic manufacture the 'Henry' vacuum cleaner, a red tub-type cleaner with a black domed lid which resembles a bowler hat. To give it an anthropomorphic character and appearance, the cleaner has a smiling face printed on it, and its 'nose' is the portal for the hose.

Although Numatic own the rights to the goodwill and reputation of their product, they do not own the rights in the actual vacuum cleaner design.

Qualtex intended to market a replica of the 'Henry', retaining the 'bowler hat' but without the smiling face and calling it the 'Quick Clean'. Numatic brought a *quia timet* passing off action to prevent the marketing of this product on the basis that even without the smiley face and name, the 'Quick Clean' would misrepresent to the public that it was a version of the Henry.

It was held that the reasonable members of the public might well mistake one product for the other, even without the branding, and the action succeeded.

4.8 ***Woolley v. Ultimate Products Ltd.*** **[2012] EWCA Civ 1038**

In an action for passing off, the question arose as to whether the public would confuse watches made as accessories by the cheap and trendy clothing company HENLEYS, with the so-called HENLEY watches made by the established (but also cheap and cheerful) watch company Timesources Ltd, given the similarity in the name, type of product and marketing. The short answer was yes.

"The judge was greatly influenced by the similarities between the HENLEY name and the HENLEYS name. They are in truth virtually identical. The judge was entitled to reach the view that they would be perceived as such by all, or almost all, prospective purchasers. It followed that a substantial number of members of the public would be involved. The judge gave reasons for holding that the misrepresentation would be the "right" way round: purchasers of watches were more likely to know of HENLEY watches than HENLEYS clothing, which was known only in the youth market." per Arden L.J. at para 46

4.9 ***FAGE UK Ltd. and FAGE Dairy Industry SA v. Chobani UK Ltd*****. [2013] EWHC 630 (Ch)**

FAGE is a Greek company which manufactures Greek yoghurt, and FAGE UK is its UK distributor. They have been selling the product in the UK since 1983 and have a 95% share of the UK market. Almost all the Greek yoghurt sold in the UK for the last 25 years has two characteristics: (i) It is made in Greece; (ii) It is made thick and creamy by being strained to remove the whey.

Chobani is a US company which started selling their thick and creamy yoghurt in the UK in 2012, calling it 'Greek yoghurt' even though it had never been near Greece and was thickened with additives, rather than being strained: such yogurt is normally called "Greek style yoghurt" by manufacturers. FAGE sued Chobani for misrepresenting the imposter yoghurt to the public as genuine 'Greek yoghurt' (and thus being liable for 'passing off'). Chobani claimed that 'Greek yoghurt' was not a specific product that the UK public particularly associated either with being Greek, or being made in a particular way: to them, it simply meant thick and creamy yoghurt.

HELD: Over the last 25 years, the yoghurt-eating public has come to have certain expectations about Greek yoghurt. Even if they do not know how Greek yoghurt is normally thickened, they would consider the additive version to be inferior to the strained version, and would also generally expect Greek yoghurt to come from Greece. The US version was, therefore, being misrepresented.

Considering the market research presented to him gave the judge leave to muse upon the imponderables of Greek yoghurt and why people care less about it.

"The uniform adoption over 25 years by suppliers to the English market of a labelling convention which limits the description Greek yoghurt only to yoghurt made in Greece seems to me to raise a powerful inference that this convention was sufficient over time to incline a substantial proportion, and probably a clear majority, of the buyers of product described as Greek yoghurt to the same conclusion. That inference is in my view in no sense diminished by FAGE's tendency (apparently shared by Asda) to describe that product as "authentic Greek yoghurt". All that the word authentic does in that context is to underline the inference as to origin which would naturally flow from the use of the adjective Greek.

"The market research materials and the survey, together with materials such as newspaper articles, certainly show that an understanding that Greek yoghurt comes from Greece is by no means as widely held among the public generally as the understanding that Champagne and Sherry both have territorial provenance, or that Swiss chocolate means chocolate made in Switzerland.

"I am also persuaded that the attribution of the description Greek yoghurt only to thick and creamy yoghurt also means that the description conveys something more than mere territorial origin, in other words that a substantial proportion of the actual or potential buyers of Greek yoghurt do think that it is in some way special, by comparison for example with those who might think that French ball-bearings come from France and Italian pencils come from Italy.

"It is impossible to do much more than speculate as to why that substantial proportion of the relevant public think that Greek yoghurt is special. Some may, as Mr Conrad thought, make a romantic association between Greek yoghurt and a Greek holiday. Some may think that Greeks use manufacturing methods that give it its special thick and creamy texture. Few would probably know how or why. The defendants' survey suggests that a very small proportion (namely 3.4%) thought that Greek yoghurt necessarily came from Greek cows, and probably an even smaller proportion would think that Greek cows produced significantly more suitable milk for yoghurt than any other cows.

"Again, a perception that there was something special about Greek yoghurt, less than fully matched for example by Greek style yoghurt, is in my view much less prevalent than the perception which has been held in other cases to exist in relation to Champagne, Sherry and Swiss chocolate. Nonetheless it is entertained in my view by a substantial proportion of the yoghurt eating population, running into hundreds of thousands of adults, and probably by a majority of those who are regular buyers of Greek yoghurt, 95% of which is produced by FAGE." per Briggs, J. at paras 112-116

4.10 ***Moroccanoil Israel Ltd. v. Aldi Stores Ltd.*** **[2014] EWHC 1686 (IP Enterprise Court)**

Moroccanoil is a leading brand of hair oil, used mainly in high-end salons. Aldi brought out a much cheaper (and evidently nastier) hair oil product (about 9-10% of the price) called 'Miracle Oil' using a similar get-up to Moroccanoil in the packaging, including a turquoise label and vertical lettering. Moroccanoil claimed that the public would be misled into thinking that the two products were either the same thing or that they came from the same manufacturer.

HELD: Although Aldi were clearly trying to make customers think of Moroccanoil when they saw Miracle Oil, most people would not assume that there was any actual trade connection between the two products. They would realise that Aldi's version was not connected to the leading brand by the fact that it was only £4 (as opposed to over £30); the fact that it had the Aldi in-house brand mark (CARINO) on it; and the fact that it was unlikely to be a high-quality product as it was on sale at Aldi's at all. There was no misrepresentation.

4.11 ***Walt Disney v. Brightspark Productions Ltd.*** **[2012] Evening Standard, 6.11.2012**

Brightspark brought out DVDs with similar names and packaging to popular Disney films – so-called 'Mockbusters'. Disney claimed that Brightspark was misrepresenting its 'appalling' animations as the original Disney versions. Brightspark initially claimed any similarities between its films and Disney's were accidental, but stopped making children's animations, asked retailers to send back stock, and told distributor Sony to destroy remaining copies. Brightspark's managing director Jeremy Davis said: *"I really believed no one in their right mind would buy 'Braver', thinking it was 'Brave'. It was on sale for £2-something in Tesco. You've never seen a Disney title for anything near that. I obviously wouldn't want any kids upset, but the feedback we get is our titles are cheap and cheerful."*

Brightspark was ordered to pay £5,000 towards Disney's costs. The whole episode cost Brightspark about £70,000. A Disney spokesperson said: *"People place great trust in our quality and creativity. We will act to protect ourselves and the consumer."*

4.12 ***Simon Cowell v. Sharon Gallacher*** **(2013) Unreported**

On December 1 2013, Simon Cowell successfully prevented Sharon Gallacher – a small time jeweller – from calling her trinket set a 'Little Mix' as it would enable her to cash in on the eponymous pop-band's success.

4.13 ***Cranford Community College v. Cranford College Ltd.*** **[2014] EWHC 2999 (IP Enterprise Court)**

Cranford Community College (CCC) is a private company which runs a prestigious secondary school in Cranford, a town in Hounslow. The school was founded in 1975, but has been called Cranford Community College only since 1997. The school logo is a crane in flight (a reference to the ancient name of the town).

In 2010, Cranford College Ltd. (CCL) established a private FE college in the town (about 500 metres from CCC) called Cranford College, aimed principally at overseas post-school aged students. Its logo is a pigeon in flight.

CCC claimed that CCL was misrepresenting itself as being associated with CCC, and that this would not only divert custom away from the school, but also would stain CCC with CCL's bad reputation (particularly in relation to the fact that CCL had at one point lost its Tier 4 trusted visa status!) As evidence of this, CCC produced various examples of misdirected post and visitors.

However, the court held that there was no misrepresentation by CCL, nor any evidence that the relevant public (e.g., parents of potential students) would confuse the two establishments, especially as CCC was aimed at school-age local children, and CCL at mature overseas students. The court also held that as 'Cranford' was the name of the location of the school, CCC would not claim a monopoly on the use of it: it was hardly on a par with Eton!

4.14 ***Fenty v. Arcadia Group Brands Ltd. (t/a Topshop)*** **[2015] 1 WLR 3291 (CA)**

Robyn Rihanna Fenty is an extremely successful recording artist, who is regarded as a style icon by many of her fans. As well as making (a great deal of) money from singing, she markets goods displaying her image, such as t-shirts. Arcadia bought the license to use a photograph of Rihanna from a commercial photographer. They printed the picture on a t-shirt and put it on sale in Topshop, without seeking permission from Rihanna. Rihanna claimed that the public would be misled into believing that this was one of her authorised products and sought an injunction to prevent the sale of the t-shirts.

HELD: The injunction would be granted. Though some members of the public might well buy the t-shirt even if they knew it was unauthorised, the sale of the t-shirt without any explanation amounted to a misrepresentation and a passing-off. The case took two years to go through the High Court and Court of Appeal, and cost about £3,000,000.

"It is of course inherent in these propositions that, registered trade marks aside, no-one can claim monopoly rights in a word or a name. Conversely, however, no-one may, by the use of any word or name, or in any other way, represent his goods or services as being the goods or services of another person and so cause that other person injury to his goodwill and so damage him in his business. Further, it is enough that the goods or services are represented as being in some way connected or associated with that other person provided that the connection is a material one in the sense that it has caused or is likely to cause him such damage in his business…

"With all these principles in mind the judge then approached the facts of present case and made his findings. He considered that the use of this image would, in all the circumstances of the case, indicate that the t-shirt had been authorised and approved by Rihanna. Many of her fans regard her endorsement as important for she is their style icon, and they would buy the t-shirt thinking that she had approved and authorised it. In short, the judge found that the sale of this t-shirt bearing this image amounted to a representation that Rihanna had endorsed it. In my judgment the reasoning of the judge discloses no error of principle of the kind for which Mr Hobbs contends." per Kitchin L.J. at para 34

4.15 ***Comic Enterprises Ltd v. Twentieth Century Fox Film Corp*** **[2016] EWCA Civ 41**

Comic Enterprises operate live entertainment clubs in the UK used primarily for stand-up comedy. Its mark, includes the words "THE GLEE CLUB" with "GLEE" particularly prominent.

From 2009, TCFF broadcast in the UK a successful musical television series entitled "GLEE", with associated concert tours and merchandise, using the sign "GLEE" in similar lettering to the club's mark.

One of the issues in the case was whether TCFF was misrepresenting its business as being associated with that of Comic Enterprises.

It was held that there had been no actionable misrepresentation. Although there may have been some public confusion, the launch of the series was not a misrepresentation such as to cause significant numbers of consumers to believe that the business behind the clubs was the same as that behind the series.

"This allegation (of misrepresentation) was dealt with by the deputy judge very concisely indeed. His reasoning is contained in this one paragraph: "An essential element of the tort of passing off is that the use of the sign by the Defendant must result in a misrepresentation. I have held above that the Mark and the sign are confusingly similar. However, the only evidence of misrepresentation is that of Tracey Jones. The rest of the evidence is what I have termed 'wrong way round' confusion. That is, evidence of people believing that the claimant's venues are connected with the defendant's TV show. Whilst it is true that confusion the 'right way round' may well never come to the attention of the parties, I am not convinced that such confusion is sufficiently likely to be said to cause damage to the Claimant. The damage suffered by the Claimant is caused by its venues being confused with the defendant's TV show and its potential customers being put off. That is not passing off." per Kitchin L.J. at para 151

5 MUST NOT BE A MERE PUFF

5.1 "A mere puff is, as its name implies, a statement favourably describing or extolling goods which by virtue of its vagueness or extravagance would not normally be regarded as something to be taken seriously or as grounding any form of liability. *Simplex commendatio non obligat*."

Benjamin on Sale, 15th Edition, para 10-005. Cited with approval by Stuart-Smith L.J in ***Fordy v. Harwood*** **(1999)**

5.2 A mere puff cannot amount to a misrepresentation. Advertisers traditionally make wild claims for their products – especially in show-business – where everything is 'the greatest' or 'the most exciting' or 'absolutely hilarious'. As long as no reasonable person would take the claims seriously, they are permitted as part of the rich fabric of life!

5.3 ***Magennis v. Fallon*** **(1828) 2 Moll. Rep. 588**

A second-rate house was described as "a desirable residence for a family of distinction".

HELD: Not a misrepresentation as a mere puff.

5.4 ***Dimmock v. Hallett*** **(1866) LR 2 Ch App 21 (CA)**

Abandoned and useless land was described by an auctioneer as "fertile and improvable". It was held that this 'flourishing description' was merely sales talk and not actionable.

5.5 ***Lichtenstein v. Clube Atletico Mineiro*** **[2005] EWHC 1300**

This case involved the transfer of Gilberto Silva from Clube Atletico Mineiro, Brazil to Arsenal. Ronny Rosenthal, a football consultant, had set up the transfer and was claiming a 10% commission on the fee. Amongst many other questions was whether he had misrepresented himself by claiming that he had "a very good relationship" with Arsenal.

The court held that he clearly had a "good" relationship (in that Arsene Wenger took his calls) and that if the word "very" was a matter of dispute, it was to be regarded as a puff, an exaggeration, which could not be relied on.

5.6 It is not always easy to distinguish a 'mere puff' from a 'representation'. Even if a statement could not possibly be true, it might still be a misrepresentation if it has a colloquial meaning which a buyer might reasonably understand. For example, describing a business as "a little goldmine" would not normally be literally true, but would indicate that it is prospering by normal business standards.

5.7 In ***Fordy v. Harwood*** **(1999)**, a replica of a vintage car made from parts of old cars was described as being 'absolutely mint' even though it had serious mechanical defects. The seller argued that it must be a puff as cars are manufactured, not 'minted', and in any case a replica car could never be in original factory condition. The Court of Appeal held that in the context, the statement meant that it was in good mechanical condition, which was not true and was therefore a misrepresentation.

5.8 ***Fordy v. Harwood*** **(1999) Unreported (CA)**

The defendant advertised a replica car for sale in a reputable vintage car publication called 'Classic Cars', in the following terms:-

"From our part-exchange corner may we offer this B.R.A. Cobra. Absolutely mint. All the right bits and does it go! Probably cost a fortune to build. Now for sale at £25,000."

The plaintiff bought the car, but discovered when he took it for its MOT that the body of the car was out of alignment with the chassis, and that to compensate for this the wheels had been realigned by placing washers on the hubs. The result was that although the car was roadworthy, the rear and front wheels did not follow the same track. The plaintiff sought to rescind the contract for misrepresentation.

The trial judge found that although the modifications were 'mechanically incorrect' and although the added washers could 'not be said to be the correct components for this car', there was no misrepresentation in the advertisement.

"The most controversial parts of the advertisement are the words 'Absolutely mint. All the right bits.' These words are said to be words of description. The remainder of the advertisement, namely, '...and does it go! Probably cost a fortune to build' are plainly mere puff. Considered on their own the words 'absolutely mint' may suggest that what is being described is in perfect condition. For example, if used of a coin or postage stamp the words would be understood to mean that the coin or stamp is newly minted or is in as good a condition as when the coin or stamp was first minted. Here the words are used of a newly constructed replica car.

"The words cannot have the same meaning as when used of a coin or stamp. In my judgment, in the context of advertisements for classic cars and when used of a replica car, these words are mere puff indicating no more than that in the salesman's opinion the car has been finished to a very high standard and that it looks good." per Previte J.

However, the Court of Appeal disagreed with this analysis and allowed the appeal by the plaintiff.

"The judge accepted that the statement 'absolutely mint' related only to the appearance of the car, namely that it looked good...But it seems to me that the appearance of the car is obvious to anybody who looks at it. No doubt with a replica car it is important that it looks like the original. But it is not a museum piece and it is intended to be driven and has to go. If it was intended as a mere puff as to the appearance of the car, the statement would be belied by that appearance, because in this case the car did look in very good condition; it seems to me that it is not in the nature of a mere puff at all. Admittedly in the context of a car that is newly constructed to some extent from second-hand parts, it cannot mean that the entire car is in new or in perfect condition. But I see no reason why it should not be a representation as to the mechanical condition of the car that it is in first class condition, correctly constructed and maintained. There is no indication in the evidence that the plaintiff was only interested in the appearance of the car and not in the mechanical condition of it at all.

"With regard to the second part of the advertisement - "all the right bits" - the judge said this: 'In my judgment the words indicate no more than that the constituent parts of the replica car are authentic. I do not consider that these words would reasonably be taken to mean that all the mechanical parts of the car are mechanically correct.'

"...In my judgment it must...mean that the right bits have been installed as such. Thus, if the manufacturers found that the axle was too short or too long for the car, one would not expect him, like Procrustes, to lengthen or shorten it to fit. That would not be all the right parts. That is in fact what happened in this case." per Stuart-Smith L.J. at p.3

5.9 ***Brewer v. Mann*** **[2012] EWCA Civ 246**

Stanley Mann, a Bentley vintage car dealer, advertised a reconstructed car as a "1930 Speed Six Bentley". It was bought on hire purchase by Mrs Mercedes Brewer, a vintage Bentley enthusiast, for £425,000. She then discovered it was not a 1930 Speed Six Bentley" at all, but a far less valuable reconstructed 1927 standard 6.5 litre engine. Furthermore, the reconstructed chassis contained only a small part of the original. She sued, *inter alia*, for misrepresentation. Mann contended that the description of the car as a 1930 Speed Six was merely an opinion; and that he had **not** represented that the reconstructed car had an original Speed Six engine or substantially its original chassis, this being an unreasonable assumption by Brewer.

HELD: The trial judge (Judge Thornton QC) found that the pre-contractual representations inaccurately, dishonestly and misleadingly conveyed the meaning to an informed reader such as Brewer that the car retained its original Speed Six engine and chassis, which had been rebuilt but still survived as a Speed Six engine with a proved capability of satisfying all aspects of the Speed Six specification. The descriptions of the car in the sale contract had the meaning "a 1930 Speed Six Bentley car containing a 1930 Speed Six engine and a 1930 Speed Six chassis". The car was no longer capable of being accurately described as such as there was an actionable misrepresentation.

However, the case went to appeal on the unusual basis that the judge had – somewhat perplexingly – rewritten his judgment four times after seeing the grounds of appeal to give further force to his conclusions, a key aspect of which was his view that Mann was dishonest in his account of the transaction. The Court of Appeal concluded that the judge's apparent loss of objectivity had led to unfairness against the defendant. They overturned the judgment and ordered a retrial.

The Court of Appeal made an interesting comment about the practical difficulty of accurately describing renovated goods, and the pragmatic leeway a judge should give a seller.

"There is an intrinsic difficulty about how to describe a car which has in its past been more or less dismantled and is then rebuilt, in part out of an original chassis, in part out of a process of cannibalisation, in part by the fitting on of a replica body, and so on. Such rebuilding is we suspect part and parcel of the survival of all but the rarest of such cars. We applaud the judge in expecting high standards of honesty (even if we fear we have had to criticise him in finding dishonesty where none was alleged). But it is not for the law to destroy a market by demanding some perfect correspondence or authenticity which, save possibly in the rarest and most price-demanding of cases, can no longer be achieved."

per Rix L.J. at para 284

6 MUST NOT BE AN UNINFORMED OPINION

6.1 An uninformed opinion will not amount to a statement of fact. If a potential investor in a theatrical production is told by the producer that the show will be a 'sure-fire hit', he will have no cause of action when it bombs, as it is clear that the statement is just wishful thinking. There is a very fine line between an uninformed opinion and a mere puff, but neither amounts to an actionable misrepresentation anyway.

6.2 ***Bisset v. Wilkinson*** **[1927] AC 177 (Privy Council: New Zealand)**

The owner of a farm told a prospective buyer that he believed his farm would support 2,000 sheep if it were properly managed, though, as both parties knew, it had never been used for sheep-farming. The buyer discovered that the farm could support nowhere near that number of sheep and sought rescission on the grounds of misrepresentation.

The court held he was not entitled to rescission on that basis as the statement was merely an honest opinion, not a misrepresentation.

"In ascertaining what meaning was conveyed to the minds of the respondents by the appellant's statement as to the two thousand sheep, the most material fact to be remembered is that, as both parties were aware, the appellant had not and, so far as appears, no other person had at any time carried on sheep farming upon the unit of land in question. That land as a distinct holding had never constituted a sheep-farm. In these circumstances, the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject." per Lord Merrivale at p.183[2]

7 AN INFORMED OPINION MAY AMOUNT TO A STATEMENT OF FACT

7.1 If a seller gives an opinion about the product in circumstances which would indicate that it is based on expert knowledge, he may be liable for falsely suggesting that he has a factual basis for his opinion (even if that were not his intention). Thus, an expert's misleading opinion may amount to a misrepresentation, not of the opinion itself, but of the implicit knowledge on which the opinion is supposedly founded.

7.2 ***Esso Petroleum v. Mardon*** **[1976] QB 801 (CA)**

Esso assured the prospective tenant of one of their petrol stations that 200,000 gallons of their petrol could be sold there each year. In fact, sales never came to anything like that figure. HELD: The case was not like Bisset as Esso were much better placed than the defendant to make a forecast of sales, given their special knowledge of the likely market.
"It is plain that Esso professed to have —and did in fact have —special knowledge or skill in estimating the throughput of a filling station. They made the representation—they forecast a throughput of 200,000 gallons—intending to induce Mr. Mardon to enter into a tenancy on the faith of it.

"They made it negligently. It was a 'fatal error,' and thereby induced Mr. Mardon to enter into a contract of tenancy that was disastrous to him. For this misrepresentation they are liable in damages."
Lord Denning M.R. at p.820[3]

[2] ***Bisset v. Wilkinson*** was applied in ***Springwell Navigation Corporation v. JP Morgan Chase Bank*** **[2010] EWCA Civ 1221** in the context of investment advice.

[3] Lord Denning also found that there was a collateral warranty regarding the likely throughput of the filling station.

7.3 ***Smith v. Land & House Property Corporation*** **(1884) 28 ChD 7 (CA)**

The vendor of a hotel described it as: "let to Mr. Frederick Fleck a most desirable tenant". In fact, the tenant had for some time been in arrears with his rent. It was held that the vendor had misrepresented a fact, for he implied that he had information which could justify his opinion.

"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is…

"But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion…In my opinion a tenant who had paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant." per Bowen L.J. at p.15

8 THE FINE ART CASES

8.1 There is a series of cases concerning the attribution of works of art. Although the description a seller gives to a work of art by way of naming the artist would ordinarily become a term of the contract (under either the Sale of Goods Act 1979, s.13 or the Consumer Rights Act 2015, s.11), it will not necessarily be a misrepresentation if it is incorrect, as statements of attribution and provenance – even by well-established auction houses – are generally regarded as mere 'uninformed' opinions which it is incumbent upon the buyer to check if he cares, especially if he or she is a serious collector. The cases on this are not consistent!

8.2 ***Leaf v. International Galleries*** **[1950] 2 KB 86 (CA)**

In 1944, Ernest Louis Leaf was induced to buy a painting of Salisbury Cathedral for £85 by an innocent misrepresentation that it was by Constable. Five years later – when he tried to sell it – he discovered the truth and claimed rescission.

HELD: The attribution was a term (under the Sale of Goods Act 1893, s.13) and also an innocent misrepresentation. However, the claim for both breach of contract and rescission was barred by lapse of time.

"Although rescission may in some cases be a proper remedy, it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred. A condition is a term of the contract of a most material character, and if a claim to reject on that account is barred, it seems to me a fortiori that a claim to rescission on the ground of innocent misrepresentation is also barred.

"So, assuming that a contract for the sale of goods may be rescinded in a proper case for innocent misrepresentation, the claim is barred in this case for the self-same reason as a right to reject is barred. The buyer has accepted the picture. He had ample opportunity for examination in the first few days after he had bought it. Then was the time to see if the condition or representation was fulfilled. Yet he has kept it all this time. Five years have elapsed without any notice of rejection. In my judgment he cannot now claim to rescind. His only claim, if any, as the county court judge said, was one for damages, which he has not made in this action. In my judgment, therefore, the appeal should be dismissed."

per Denning L.J. at p.90/91

8.3 ***Drake v. Thos. Agnew & Sons Ltd*. [2002] EWHC 294**

Richard Drake, a Texan millionaire, asked Callan, an art dealer, to acquire for him an Old Master to add to his art collection. Callan bought from Agnew's, a well-known specialist in Old Masters, a painting described as being "by Sir Anthony van Dyck". The price was £2,000,000. Callan was due a commission from Drake of 5-10%.

Agnew's had bought the painting from Sotheby's, who had described it in their catalogue as being "after Sir Anthony van Dyck", which indicated that it was a copy. In fact, there had been considerable expert debate about the painting's provenance. Agnew's did not point this out to Callan, but they did volunteer to answer any questions Callan may have about the painting before purchase, and he could easily have researched the provenance himself as the debate was well documented.

The painting was not by van Dyck, but it was held that Agnew's statement that it was did not amount to a term of the contract, even under s.13 of the Sale of Goods Act 1979. Callan, as an art dealer, ought to have known that the statement was merely an opinion which he should verify himself. (In fact, Callan was a rogue who was deliberately ignoring the problems with the provenance to ensure his commission from Drake.)

"In general, mere expressions of opinion or belief are not contractual; without more they do not become terms of any subsequent contract. Clearly one party may be so confident in his opinion, for example, as to the authenticity or origin of an object or painting that he is prepared to contract on that basis. He may have good commercial reasons for doing so. But in such cases an objective assessment of all the circumstances must point to that conclusion. The conclusion must be that the common intention of the parties was that the content of the opinion or belief was to become a term of the contract. The obvious and sensible way to achieve that result is to say so; but the courts are often called upon to resolve cases in which the parties have not so clearly expressed their intention and although it may be tempting, it is not always just to conclude that they did not have the necessary intent simply because they did not express it.

"Obviously Agnew's references to the painting as "by van Dyck" or "a van Dyck" were expressions of opinion. No one could sensibly have believed that Agnew's knew, or had some magic formula for establishing, that van Dyck himself had painted the canvas. Insofar as it may be necessary for me to find that Mr. Drake and Mr. Callan both understood that, I do. Mr. Drake was a serious collector and Mr. Callan a dealer." per Buckley J. at paras 25-26

8.4 ***Thomson v. Christie Manson & Woods* [2005] EWCA Civ 555**

Christie's described two urns in its auction catalogue as a pair of Louis XV (1715-1774) porphyry and gilt bronze two handled vases and claimed that they had been designed by the renowned French designer Petitot for the Duke of Parma in about 1760. On that basis, Ms. Thomson, a wealthy Canadian collector, paid £1.75 million for them in 1994. She heard in 1998 that the urns might, in fact, be 19th century copies and worth a mere £25,000. She sued Christie's *inter alia* for misrepresentation.

Although there was a 70% probability that the urns *were* of the stated period, it was in fact impossible to say whether they had been made in France or Italy, and whether they were indeed made by Petitot. Christie's claimed that the catalogue description was accurate enough as a knowledgeable collector would know that the description was merely an opinion, since it is notoriously difficult to give accurate attribution to such urns because of the number of later copies made inside and outside Italy. Jack J. held that Christie's had a duty fully to explain these authentication problems to the buyer (who they knew personally as a "special client") and that this lack of disclosure did amount to a misrepresentation. However, the Court of Appeal overturned the decision. In the circumstances the doubts as to the dating and place of manufacture of the vases, while present, had not been sufficiently serious as to require the defendants to qualify the description in the catalogue or otherwise to draw the claimant's attention to them.

"People, including professional people, who, by giving information in the nature of advice, assume a responsibility giving rise to a duty of care, do not thereby normally undertake to draw attention to the obvious — see Tomlinson v. Congleton Borough Council [2004] 1 AC 46. What is to be regarded as obvious depends on the characteristics and experience of the person receiving the information. Nor are they obliged to draw attention to risks which are fanciful, although of course some risks which are very small may be anything but fanciful, as, for instance, in cases of medical or surgical treatment. It is Christie's case that they did not proffer, and Ms Thomson did not ask for, any opinion other than an opinion about the date and quality of the vases. She did not ask for, and was not entitled to expect, general advice about whether or not to buy the vases, nor as to any more general commercial risk in doing so. Ms Thomson was indeed a special client, but the services offered to special clients were generically the same as those available to any potential buyer." per May L.J. at paras 95 and 96

8.5 ***Avrora Fine Arts Investment v. Christie Manson &* Woods [2012] EWHC 2198 (Ch)**

The claimant company – Avrora – was the alter ego of Viktor Vekselberg, a very wealthy Russian art collector. In 2005 he successfully bid for a painting called "Odalisque" which was catalogued as being by Boris Kustodiev, a famous Russian artist. £1.5 million was paid. The painting turned out to be a forgery, and Avrora claimed, *inter alia*, that Christie's were liable for negligent misrepresentation by attributing the picture unequivocally to Kustodiev, and thereby impliedly representing that they had reasonable grounds for the attribution when they did not.

Christie's contended that their terms of sale – which included a limited warranty that they would refund the purchase price of any painting found to be a forgery – indicated that they were not also representing any 'opinions' as to attribution as anything but uninformed. The court did not agree. Newey J. held that there **had** been a misrepresentation, but that Christie's were saved from liability by their effective exclusion clause (discussed later).

"It is plain, I think, that a person making a promise will not necessarily be expressing any opinion. Were I to warrant that it would snow next Christmas, that might not mean that I believed that that would happen, let alone that I had reasonable grounds for so believing. In effect, the warranty would represent a bet. On other occasions, a warranty might serve to allocate risk without any representation of opinion being made. If, on the other hand, the person giving a warranty is to be taken to have expressed an opinion on the relevant point, I do not see why the fact that he is also giving a warranty should preclude an implied representation that he has reasonable grounds for that opinion. The fact that he is prepared to back up his opinion with a warranty might be thought to reinforce the impression that he has a basis for it rather than to negate it.

"In the present case, it is clear that Christie's not only warranted that "Odalisque" was by Kustodiev but represented that that was its opinion: for example, a page of the catalogue headed "Important Notices and Explanations of Cataloguing Practice" explained that where, as was the case with "Odalisque", the catalogue gave the name of an artist without any qualification, that meant that the work was "[i]n Christie's opinion a work by the artist". Since Christie's was giving its opinion as well as a warranty, it seems to me that it impliedly represented that it had reasonable grounds for holding that opinion."

per Newey J. at paras 133 and 134

9 A STATEMENT OF FUTURE INTENTION WILL NOT NORMALLY BE A STATEMENT OF FACT

9.1 It is not a misrepresentation to state your future intentions and then not to carry them out. Thus, you may attract people to invest in your film project by telling them that you intend to cast only Hollywood 'A-Listers' in the lead parts. If you then change your mind and cast lesser-known actors instead, this will not make your original statement a misrepresentation, unless it was a lie in the first place.

9.2 ***Wales v. Wadham*** **[1977] 1 WLR 199**[4]

During divorce negotiations, the husband promised to pay the wife a final maintenance provision of £13,000 as the wife had repeatedly stated that she had no intention to remarry. Shortly after the divorce, the wife did remarry so that, but for the agreement, the husband would have had not to pay her maintenance at all. The husband claimed rescission on the basis of the misrepresentation.

HELD: The wife's statement of intention was honestly held when she made it, and it was not a misrepresentation for her to change her mind.

"A statement of intention is not a representation of existing fact, unless the person making it does not honestly hold the intention he is expressing, in which case there is a misrepresentation of fact in relation to the state of that person's mind. That does not arise on the facts as I have found them. On the facts of this case, the wife made an honest statement of her intention which was not a representation of fact, and I can find no basis for holding that she was under a duty in the law of contract to tell the husband of her change of mind." per Tudor Evans J. at p.211

9.3 A statement of intention may be a statement of fact if it was never honestly held, as the representor would then be lying about his or her state of mind.

Edgington v. Fitzmaurice **(1885) 29 ChD 459 (CA)**

Directors of a company invited a loan from the public stating their intention to spend the money on improvements to the buildings. They actually intended to use the money to pay off existing debts. HELD: This was a misrepresentation.

"There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." per Bowen L.J. at p.483

9.4 If the representor states his or her true intention, and then changes his or her mind BEFORE the contract is concluded, there may be a duty to update the other party. This is discussed later.

[4] ***Wales v. Wadham*** was overruled by the House of Lords in ***Livesey v. Jenkins*** **[1985] 1 AC 424** insofar as it related to a divorce settlement. Under the Matrimonial Causes Act 1973, the wife should have made full and frank disclosure of the fact that she was even contemplating remarriage, and Tudor Evans J. had erred in law to waive this requirement on a technicality as he had done. This does not affect the general validity of Tudor Evan J's comments on statements of intention.

EXERCISE ONE

Audrey has owned and managed a hair-dressing salon for the last ten years. She is negotiating to sell it to David. Which of these statements is likely to be construed as being a statement of fact, a statement of opinion, a mere puff or a statement of future intention?

i. This is the Salon of the Stars.
ii. Business is booming.
iii. We have over 1,000 regular customers.
iv. There is very good scope for opening a nail-bar on the premises.
v. I will be moving to Spain as soon as I sell up, so you will not have to compete with me.

10 THERE MUST USUALLY BE AN ACTUAL STATEMENT – NOT MERE SILENCE

10.1 A 'statement' may be made by a 'nod or a wink or a shake of the head' (***Walters v. Morgan*** **(1861) 3 De G&F 718** per Lord Campbell.) However, you cannot normally be liable if you have made no statement at all. There is no general duty to reveal information about which you have not been asked.

10.2 ***Bell v. Lever Bros. Ltd.*** **[1932] AC 161 (HL)**

"The failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract." per Lord Atkin at p.227

10.3 ***Keates v. The Earl of Cadogan*** **(1851) 10 CB 591 (Common Pleas)**

A landlord let a house to a tenant who he knew wanted it for immediate occupation. He did not reveal that the house was uninhabitable as it was in an unfit and dangerous state.

HELD: There was no misrepresentation. In the absence of fraud, there is no duty to disclose such information. It was up to the tenant to make proper investigations before renting the property.

"It is not pretended that here was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit."

per Jervis C.J. at p.600

10.4 ***Smith v. Hughes*** **(1871) LR 6 QB, 597 (DC)**

The plaintiff sold horse oats to the defendant, a horse trainer. The defendant had examined a sample of the oats and had failed to realise that they were 'new oats' when what he needed was 'old oats'. The defendant then refused to pay. The defendant claimed *inter alia* that there had been a misrepresentation by the plaintiff, who should have realised that the defendant would only have wanted 'old oats' and that he was therefore mistaken as to what he was buying. He claimed that the plaintiff's silence amounted to a misrepresentation. It was held that a mere silence in such a case was not, in itself, enough to amount to a misrepresentation.

"A belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate." per Hannen J. at p.610

10.5 Given that parties do not generally have to reveal what they have not been asked about, it is incumbent upon contracting parties to ask the right questions.

10.6 ***Sykes v. Taylor-Rose*** **[2004]** (**Unreported) (CA)**[5]

Alan and Susan Sykes bought a house in Yorkshire from James and Alison Taylor-Rose in 2000. The Taylor-Roses sold the house because they had discovered that it had been the scene of a grisly child murder in 1985. They did not disclose this to the buyers. However, the new owners discovered about the crime when they saw their house on a television documentary about the murder. They too felt unable to live there, and sold the house at a loss of £8,000.

They sued the Taylor-Roses on the basis that the sellers have answered "no" when asked in the purchase documents: "Is there any information which you think the buyer may have a right to know?"

The Court of Appeal held that this answer was not dishonest and that although they sympathised with the claimants, there was no duty on the seller to disclose the history of the house to the buyer.

"It was accepted in this court that there was no legal obligation upon the vendors to disclose the history of the property… The words "have a right to know"…cannot be construed to refer to information which might materially affect the enjoyment or value of the property as submitted by Mr Freedman (acting for Sykes)… Mr Freedman's submission construes the question as referring to any information that would affect the enjoyment of the property whether or not the vendor thought that the purchaser had a right to know it. Such a construction disregards the plain meaning of the words." per Sir William Aldous

[5] The seller's duty of disclosure was examined in ***Thorp v. Abbotts*** **[2015] EWHC 2142 (Ch).**

11 CONCEALMENT OF THE TRUTH MAY AMOUNT TO A SILENT STATEMENT

DELIBERATE CONCEALMENT

11.1 As indicated by Hannen J. in ***Smith v. Hughes***, deliberately concealing a defect may amount to a 'statement' by conduct**.**

11.2 ***Gordon v. Sellico*** **[1986] EGLR 71 (CA)**

The estate agents of a flat deliberately concealed patches of dry rot to make it more saleable. The Court of Appeal upheld Goulding J.'s judgment that this **did** amount to a misrepresentation, even though the buyers were unaware of it at the time of sale.

"The law must be careful not to run ahead of popular morality by stigmatising as fraudulent every trivial act designed to make buildings or goods more readily saleable, even if a highly scrupulous person might consider it dishonest. But it is to my mind quite a different matter for an intending vendor to hide so sinister and menacing a defect as dry rot... In my judgment the concealment of dry rot by Mr. Azzam was a knowingly false representation that Flat C did not suffer from dry rot, which was intended to deceive the purchaser, and which did deceive the plaintiffs to their detriment. I am satisfied that the plaintiffs would not have entered into a contract or accepted the lease had they known there was dry rot inside Flat C."

per Goulding J. at p.74

NEGLIGENT CONCEALMENT

11.3 Even a negligent concealment of a material fact might amount to a misrepresentation.

11.4 ***Pilbrow v. Pearless De Rougemont & Co*** **[1999] 3 All ER 355 (CA)**

Stuart Pilbrow telephoned a firm of solicitors and asked for an appointment to see a solicitor about a family matter. The receptionist arranged an appointment for him with Miss Lee-Haswell, who advised Mr. Pilbrow and instructed counsel on his behalf. Mr. Pilbrow lost the case, and then discovered that Miss Lee-Haswell was not in fact a qualified solicitor at all, although she was highly experienced in family law. Mr. Pilbrow refused to pay the balance of his bill on the grounds that the misrepresentation as to Miss Lee-Haswell's status had induced him to enter into the contract which he would not otherwise have done. The solicitors sued him for the £1,800 [£2,090] outstanding claiming that there had been no misrepresentation, but simply a non-disclosure which was not actionable as this was not a contract of the utmost good faith. The trial judge found for the solicitors. The fact that Pilbrow had specifically asked for an appointment with a solicitor did not mean that he especially wanted a solicitor. It was just a way of asking for legal services. *"You would not phone a firm of solicitors and ask for an accountant."*

The Court of Appeal disagreed with this analysis: *"The very fact that a potential client has telephoned a solicitors' firm reveals that he probably wants legal advice. The conversation starts on that unspoken premise. When he then says that he wishes to talk to a solicitor he is not to be taken as making clear that he does not want to talk to an accountant or a plumber. What he is making clear is that he wishes to talk to someone who is a solicitor as opposed to someone not qualified as a solicitor."*

per Shiemann L.J. at p.4

The Court of Appeal found for the defendant, but on the basis that the firm were in breach of contract. They refrained from reaching an unnecessary conclusion on the misrepresentation issue, but the case does seem to indicate that negligent concealment in such a situation might amount to a misrepresentation.

12 SILENCE CAN AMOUNT TO A MISREPRESENTATION

12.1 There are three exceptions to the rule that there is no duty of disclosure:-

1) When a statement made in the course of negotiations subsequently becomes untrue;

2) When a literally true statement suggests a falsehood (i.e., half-truths);

3) In contracts of utmost good faith (e.g., insurance). These are known as contracts *uberrimae fidei.*

SUBSEQUENT UNTRUTHS

12.2 Although a representation may be true when it is made, there may be a duty to update the other party if it subsequently becomes untrue before the contract is made.

12.3 ***Traill v. Baring*** **(1864) 4 DJ & S 318**

An insurance company made a proposal for reinsurance to a second company, stating that it would retain part of the risk. This was the intention at the time, but before the proposal was accepted, the first company disposed of that part of the risk. It was held that this "change of intention" should have been disclosed to the second company.

12.4 ***With v. O'Flanagan*** **[1936] Ch 575 (CA)[6]**

Dr. O'Flanagan told Dr. With that his medical practice was worth £2000 [£90,525] p.a., which was then quite true. For the next four months O'Flanagan was seriously ill and his practice was looked after by a number of locums until it became virtually non-existent. Relying on his earlier statement, With bought the practice, then claimed rescission. HELD: Rescission was granted as the seller had a duty to disclose the changed circumstances to the buyer.

"If a statement has been made which is true at the time, but which during the course of negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the changed circumstances." per Lord Wright M.R. at p.582

"If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A cannot hold B to the bargain." per Romer L.J.

12.5 ***Spice Girls Ltd. v. Aprilia World Service BV*** **[2002] EWCA Civ 15 (CA)**

The Spice Girls, a pop group of five ambiguously talented but outrageously successful women, entered an agreement with AWS by which AWS would sponsor the group's European Tour in return for endorsement of Aprilia motor scooters to be marketed under the brand name "Spice Sonic."

Before the agreement was concluded, Geri Halliwell, a member of the group, told the others that what she wanted - what she really, really wanted - was to leave the group. AWS was not informed, and when they discovered that the Fab Five they bargained for were, in fact, the Less-than-Fab Four, they refused to pay the royalty under the agreement, claiming that they had been induced to enter the contract because of a misrepresentation by silence.

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[6] In ***Wales v. Wadham*** **[1977]** (above) the court distinguished ***With v. O'Flanagan*** on the basis that the earlier case had involved statements of existing *fact* rather than statements of *intention* as to future conduct. ***Wales v. Wadham*** may also be distinguished from ***Traill v. Baring*** in that the wife had not actually remarried when she accepted the husband's offer, whereas the first insurers had acted upon their change of intention at the time of the contract. This is not a particularly satisfactory distinction, and Treitel suggests that the earlier case is the stronger one. ***Wales v. Wadham*** was disapproved of by the House of Lords in ***Jenkins v. Livesey*** **[1985]** AC 424, but only on the grounds that the wife had a STATUTORY duty to make full disclosure under the Matrimonial Causes Act 1973, ss.23-25. This does not affect the common law rule. See also the footnote to 9.2 above.

HELD: *Inter alia*, that there had been a material misrepresentation to the effect that none of the group had an existing declaration to leave. AWS should have been told of the changed circumstances before the contract was concluded.

HALF TRUTHS

12.6 A statement which is literally true may mislead the respresentee by omitting pertinent facts. In this case, the representor may have a duty to disclose the full facts surrounding the statement.

12.7 ***Nottingham Patent Brick and Tile Co. v. Butcher* (1866) 16 QBD 778**

N who wanted to buy land from B asked their solicitor whether the land was subject to any restrictive covenants. The solicitor replied that he was not aware of any. In fact, there were restrictive covenants which limited the use of the land. The reason why the solicitor was unaware of the covenants was that he had not read the deeds. HELD: Although what the solicitor said was literally true, it was a misrepresentation by omission.

cf. *Brown v. Raphael* [1958] Ch. 636 (CA) above.

12.8 ***Dimmock v. Hallett (1866) LR 2 Ch App 21 (CA)***

Land which was for sale was described as 'let to Hickson at £130 p.a.' and 'let to Wigglesworth at £160 p.a.'. Although this was true, the vendor omitted to mention that both tenants had given notice to quit. This was held to be a misrepresentation as it was a fair inference that the tenants had *not* given notice to quit.

12.9 ***Banks v. Cox (No.2)* [2000] Unreported**

The claimants purchased the 50-year lease of a nursing home whose business was largely dependent on social service referrals. Before the purchase, the sellers had been sent a letter detailing plans for serious reductions in social service funding and referrals in the financial year following the purchase.

HELD: By not revealing the contents of the letter, the sellers had falsely represented the profitability of the nursing home. (The actual issue in the case was whether the letter had ever been received.)

12.10 ***Inntrepreneur Estates Ltd. v. Hollard* [2000] Unreported (CA)**

The claimant owned a tied public house. It was leased to the defendants on a twenty-year lease. They were induced to take the lease on the basis of records showing the annual barrelage was about 480. In fact, although this was accurate for the period of those records, more recent records showed a barrelage of only 400.
HELD: *Inter alia*, that the statement as to the barrelage of 480 was a misrepresentation.

12.11 ***National Guild of Removers and Storers Ltd. v. Bee Moved Ltd*. [2016] EWHC 3192 (IPEC)**

The National Guild of Removers and Storers is a well-respected trade association, which represents members of the removals and storage industry.

Bee Moved Ltd., which is not a member, included the following advice on its website to people moving house:

Moving checklist

- *hire a removal company at least two weeks before you move*
- *use a removal company who is a member of the National Guild of Removers and Storers*
- *get at least three quotes before deciding which one to use. Our associates at Beemoved.com will always where possible supply you with four quality companies in your area*
- *check if the company offers a discount on a weekday*
- *check the fine print in your moving insurance*
- *make a list of your possessions so you can check if you've left anything behind*

NGRS claimed that Bee had thereby misrepresented itself as being a member of the National Guild of Removers and Storers, as no reasonable member of the public would read the second bullet point without supposing that Bee was such a member.

The court agreed that this was a misrepresentation, despite the fact that the defendant had made no direct or explicit claim about its membership, or lack of it.

12.12 A statement will not be a half-truth if the receiver has made an unreasonable and unintended assumption about its significance.

12.13 ***Leni Gas and Oil Investments Ltd. v. Malta Oil Pty Ltd*. [2014] EWHC 893 (Comm)**

Malta Oil owned 90% interest in an offshore oil and gas exploration block, and purchased the other 10% from Leni. The value of Leni's shares would have been significantly higher if Malta Oil had secured a 'farming out' partner to share the financial risks involved in searching for oil. In fact, at the time of the sale of the shares, Malta Oil was in serious negotiations with Genel Energy, an Anglo-Turkish exploration company, for a farm out agreement, which eventually led to the agreement being concluded. It did not tell this to Leni.

Leni claimed that it had been misled by Malta Oil's representative, Dr. Bill Higgs, who had told them during the negotiations for the sale of the shares that a farm out would be vital for the success of the project and that Malta Oil was opening a data room in London to analyse seismic data (presumably with a view to attracting a farm out). Although these statements were both true, Leni took them to indicate that not only was there no farm out partner yet on board, but that there were no serious negotiations or discussions yet going on with any viable partners. Leni claimed that they would not have sold the shares had they known the full truth.

HELD: Leni's construction of the conversation as an implied misrepresentation was not reasonable. They could not have expected Higgs to reveal the confidential ongoing negotiations between Malta Oil and Genel; and the opening of a data room was not inconsistent with such negotiations either taking place at all, or being at an advanced stage. There was no misrepresentation by omission.

12.14 ***Burntcopper Ltd. (t/a Contemporary Design Unit) v. International Travel Catering Association Ltd*. [2014] EWHC 148 (Comm)**

ITCA was a company which organised trade shows and conferences. For thirty years it had made repeated contracts with CDU, which provided management services such as designing the hall layout, constructing common areas in the exhibition halls, setting up and shutting down etc. In 2011 ITCA entered such a contract with CDU, but did not disclose that it was thinking of selling its business, which would have prematurely terminated the contract. CDU claimed, *inter alia*, that this was a misrepresentation by omission, as by entering the renewed contract, ITCA had implied that it would be staying in business for the duration of it.

HELD: There was no obligation on ITCA to reveal its future intentions to CDU, and therefore no misrepresentation by not doing so.

"CDU must always have known that there was a commercial risk that the show would be cancelled. Even long-term commercial arrangements come to an end. Generally, parties to contracts have no obligation to disclose threats or opportunities which come to their notice and which may affect the relationship."

per HHJ Mackie QC at para 62

CONTRACTS OF 'UTMOST GOOD FAITH': UBERRIMAE FIDEI

12.15 Although there is no general duty in England to act in 'good faith' when making a contract (as there is in many other jurisdictions), certain contracts are treated as being 'of the utmost good faith', and there is an obligation for the parties to reveal all information which could reasonably be regarded as relevant. These traditionally include contracts establishing family settlements and contracts of insurance.

12.16 Technically, non-disclosure in contracts *uberrimae fidei* may not be classified as a 'misrepresentation' but is more akin to a breach of duty. Thus, although the contract may be rescinded in equity, damages will not be available either at common law or under the Misrepresentation Act 1967.[7]

***Banque Keyser Ullman S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1990] 1 QB 665 (CA)[8]**

Slade L.J. pointed out that the Misrepresentation Act 1967 requires a misrepresentation to be 'made', which would not include a situation where it was simply inferred from silence. Furthermore, he said:-

"(There is) no support whatever to the proposition that a breach of the duty of disclosure in contracts uberrimae fidei always as a matter of law falls to be treated as constituting a misrepresentation."

per Slade L.J. at p.789

Settlements

12.17 ***Gordon v. Gordon* (1816) 3 Swan 400**

The younger son of a family did not reveal that, contrary to popular belief, his elder brother was born legitimately. As this was highly relevant to the making of a settlement in favour of the younger son, the contract of settlement was set aside.

Insurance Contracts

12.18 ***Lambert v. Co-Operative Insurance Society Ltd.* [1975] 2 Lloyd's Rep 485 (CA)**

In April 1963, the plaintiff signed a proposal form for one of the defendant company's "All Risks" insurance policies to cover her own and her husband's jewellery. No questions were asked, and the plaintiff gave no information about, her husband's previous convictions, though she knew he had been convicted of receiving stolen cigarettes some years earlier. The policy was renewed annually, and in 1971 the husband was convicted for another two offences of dishonesty and sentenced to 15 months imprisonment. This was not disclosed to the insurers when the policy was renewed. In 1972, the plaintiff made a claim for £311 being the value of seven items of jewellery which had been stolen. The insurers refused to pay on the grounds that she should have revealed the first conviction, or at least revealed the second.

HELD: There was a duty to disclose every fact which would affect the judgment of a prudent insurer, both when applying for an insurance policy and when renewing it. Thus, the policy was void.

12.19 ***Brit UW Ltd. v. F&B Trenchless Solutions Ltd.* [2015] EWHC 2237 (Comm)**

An insurer applied for a declaration that it had validly avoided a public liability policy into which it had entered with the assured.

The assured was a sub-contractor which had installed a concrete micro-tunnel under a road and railway level-crossing. It had estimated that after the work, the railway track above the tunnel would settle 2-4mm. However, when the work was completed, the track had settled 11-12mm. The settlement subsequently increased to 15-18mm. A void also appeared in the road.

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[7] It is common practice for insurance companies to insert a 'basis of the contract' clause in the proposal form which requires the insured to warrant the truth of even non-material facts. Thus, if anything said by the insured proves to be untrue, even if it is not material to the claim, and even if the insured is not at fault, the insurance company will incur no liability.

[8] See HL decision at 12.21 below for details of the case.

The assured then took out a contractors' combined liability policy with the insurer, which provided cover for employers' liability, public liability and product liability. Shortly afterwards, a freight train derailed when passing over the level-crossing. The cause was severe settlement of the railway track caused by a void in the ground underneath the track.

The Rail Accident Investigation Board concluded that the void under the railway and other voids under the adjacent road surface had been caused by excessive ground loss during the construction of the micro-tunnel.

The insurer avoided the policy on the grounds that the assured had (i) failed to disclose not only the settlement of the track and the void in the road that had appeared before the policy was taken out, but also that the railway line was active; (ii) misrepresented that it did not carry out tunnelling works on railway lines that were active. (Westlaw abstract)

12.20 The problem with insurance policies is usually an omission by the party being insured, rather than by the insurers, but the duty of disclosure is reciprocal, and the insurers may be liable for failing to reveal a matter of obvious importance to the party insured.

12.21 ***Banque Keyser Ullman S.A. v. Skandia (U.K.) Insurance Co. Ltd.*** **[1991] 2 AC 249 (HL)**

Various syndicates of Swiss banks were lending about £30 million to four Liechtenstein or Swiss companies controlled by Signor Jaime Ballestro. The loans were made on the security of various gemstones and credit insurance policies. The insurance policies were arranged through a broker, Roy Lee, who arranged to place part of the primary insurance cover for the first and subsequent loans with Skandia (U.K.) Insurance Co. Ltd. through its senior underwriter, A.C. Dungate.

Lee was unable to provide complete security for the insurance, but issued false cover notes to suggest that the cover was complete. Dungate became aware of this fraud, but informed neither his employers (the insurance company) nor Lee's employers (the brokers). The banks lent the money to B. on the basis that the cover notes were genuine.

B defaulted on the payments, and absconded with the money, the gemstones proving to be virtually worthless.

The banks were unable to claim under the insurance policy because there was a valid exemption clause relating to fraud, but claimed instead that there had been a misrepresentation by the insurance company in not revealing to them the deceit being practised by their brokers.

HELD: In a contract of insurance there is an obligation *uberrimae fidei* falling upon both parties, and the duty upon the insurer extends at least to disclosing all facts known to him which are material to the risks sought to be insured or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he sought cover with the insurer. Breach of such a duty would not give the right to damages but only the right to rescind the policy and recover the premiums.

On the facts of the case, the House of Lords held that Dungate was not under a duty to disclose Lee's fraud as such a discloser would not have given the insurer the right to repudiate its liability anyway.

12.22 The duty owed to the insurer by consumers has been modified by statute.

Consumer Insurance (Disclosure and Representations) Act 2012

s.2 Disclosure and representations before contract or variation

(1) This section makes provision about disclosure and representations by a consumer to an insurer before a consumer insurance contract is entered into or varied.

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer.

(3) A failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of this Act (whether or not it could be apart from this subsection).

(4) The duty set out in subsection 2 replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied.

(5) Accordingly—

(a) any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of this Act, and

(b) the application of section 17 of the Marine Insurance Act 1906 (contracts of marine insurance are of utmost good faith), in relation to a contract of marine insurance which is a consumer insurance contract, is subject to the provisions of this Act.

12.23 The duty owed to the insurer by non-consumers has been similarly modified.

The Insurance Act 2015

s.3. The duty of fair presentation

(1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.

(2) The duty imposed by subsection 1 is referred to in this Act as "the duty of fair presentation".

(3) A fair presentation of the risk is one—

(a) which makes the disclosure required by subsection 4

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

(4) The disclosure required is as follows, except as provided in subsection 5

(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5) In the absence of enquiry, subsection 4 does not require the insured to disclose a circumstance if—

(a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives information.

COMPANY DIRECTORS

12.24 Company Directors owe a fiduciary duty to the company, but this does not normally extend to the shareholders themselves. However, there are circumstances where directors may be held to owe particular fiduciary duties to shareholders, which may involve full disclosure of matters relating to resolutions etcetera. Such duties are dependent on establishing a "special factual relationship" between the directors and the shareholders.[9]

12.25 This special relationship has to be something over and above the usual relationship which a director has with shareholders. It is not enough that a director has more knowledge of the company's affairs than the shareholders because that would almost inevitably be the case.

12.26 ***Sharp v. Blank*** **[2015] EWHC 3220 (Ch**)

The shareholders of Lloyds TSB, alleged misrepresentations by the bank's directors concerning its acquisition of Halifax Bank. The court struck out various claims that the directors had breached their fiduciary duties by not making full disclosure of pertinent matters. Although the directors had a duty to provide the shareholders with sufficient information to enable them to make an informed choice about the acquisition, they did not owe any wider fiduciary duties because no special relationship existed and they had not undertaken to act for the shareholders in any more extended sense.

13 CRITICAL MISQUOTES, THEATRES AND MEDIUMS

13.1 It is common practice for theatre producers to edit their bad reviews so that they appear to be good. This is done by selecting odd phrases and even single words from a poor review to give the false impression that the show was regarded as a hit. There have been no lawsuits about this, presumably because regular theatre-goers know of this practice and are not deceived by it, and occasional theatre-goers are unlikely to check the full review after a dire evening of thespian torture. They will just assume that the critic is an idiot.

13.2 The practice of using misleading selective quotations was outlawed by the Consumer Protection from Unfair Trading Regulations 2008, which came into effect on May 26th 2008. It is a criminal offence to engage in a commercial practice which in some way is likely to deceive the average consumer into making a contract that they would otherwise not have made. This includes the publication of selective half-truths.

13.3 **Consumer Protection from Unfair Trading Regulations 2008**

PROHIBITION OF UNFAIR COMMERCIAL PRACTICES

3.— (1) Unfair commercial practices are prohibited.

(2) Paragraphs (3) and (4) set out the circumstances when a commercial practice is unfair.

(3) A commercial practice is unfair if—

(a) it contravenes the requirements of professional diligence; and

(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

[9] ***Peskin v. Anderson*** **[2001] B.C.C. 874**

MISLEADING ACTIONS

5.— (1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfies the conditions of this paragraph—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

MISLEADING OMISSIONS

6.— (1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

(a) the commercial practice omits material information,

(b) the commercial practice hides material information,

(c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

(d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

13.4 The regulations also affect the advertising practices in industries whose value cannot be empirically proved. These include faith healers, astrologers, spiritualists and mediums. They must now describe their services as being “for entertainment only” and “not experimentally proven”.

13.5 Note, however, that the regulations do not outlaw obvious sales puffs:

2 (6) (This) is without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.

EXERCISE TWO

Consider these real reviews for three West End shows. What could the producer extract from them to make them sound like positive reviews? Would it be legal to do so?

WE WILL ROCK YOU: One-star review by Caitlin Moran from The Times

"For all its stunning looks – the massive plasma-screens are killer-diller and all the cast have good shoes – 'We Will Rock You' is just too straight. The script remains little more than two-minute blasts of knob gags and misplaced polemic between songs, and the musical numbers have nothing to do with the script."

BEHIND THE IRON MASK: Peter Brown for London Theatre

"To create a successful show with a cast of just 3 and a 2-hour running time really means it's essential to have an incredibly powerful story, as well as great dialogue and excellent musical numbers. But 'Behind The Iron Mask' has none of these. In fact I'm surprised that anyone thought it could ever make the grade in this respect. It's one of the poorest stories I've encountered for some time, and the songs sound for the most part as though they've been cobbled together by a third rate, burnt-out music teacher in his spare time, inspired by his Lloyd-Webber collection. Quality theatre this most certainly is not."

VIVA FOREVER!: Miranda Sawyer, the Observer

"Oh dear, there is very little to recommend this show. The songs are murdered... Viva and her friends are bland and indistinguishable; everyone else is a cliche. There's not much cockle-warming, despite the performers' best efforts. There is some glitz. But it says something when you find yourself scanning the audience for entertainment (there's Cilla! And Michael Caine!); and when the most riveting plot point of the evening is whether or not Posh Spice will ever acknowledge the rest of her old band."

14 THE STATEMENT MUST INDUCE THE MAKING OF THE CONTRACT

INTRODUCTION

14.1 A person cannot recover for misrepresentation if the false statement did not affect his or her decision to enter into the contract.

Francis v. Knapper **[2016] EWHC 3093 (QB)**[10]

"Clerk & Lindsell on Torts, 21st Ed., at §18–01, states that the tort of deceit involves the following "perfectly general principle ", namely that " where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable " (my emphasis). The essence of the wrongful conduct is making (or procuring the making of) a statement intended to be acted upon, knowing it to be untrue or having no belief in its truth. The tort of deceit protects claimants from the harmful consequences of statements made to them that ought never to have been made. For the claimant, therefore, the essence of the claim is that the making of a statement that ought not to have been made has caused him loss. Hence, it is the claimant's burden to show "that he acted in reliance on the defendant's misrepresentation. If he would have done the same thing in the absence of it, he will fail. What is relevant … is what the claimant would have done had no representation at all been made."

"As Clerk & Lindsell goes on to say at §18–35, whilst the claimant must show "that he was induced to act as he did by the misrepresentation, it need not have been the sole cause. Provided it substantially contributed to deceiving him, that will be enough." per Andrew Baker J. at paras 31 and 32

14.2 Thus there is no claim for misrepresentation if the victims:-

1. were not aware of the misrepresentation; or
2. relied on their own information; or
3. would have made the contract despite the misrepresentation; or
4. knew the statement to be false.

14.3 However, a person will not normally be taken to have knowledge of the truth just because he or she did not take the chance to investigate the statement.

THE BURDEN OF PROOF

14.4 The burden of proof is on the misled party to prove that he was induced by the misrepresentation, but it may be enough to show that the misrepresentation was calculated so to induce him to raise a presumption in his favour. This is especially true in cases of fraudulent misrepresentation.

14.5 ***Redgrave v. Hurd*** **(1881) 20 Ch D 1 (CA)**

"If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the grounds that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation." per Sir George Jessel M.R.

[10] See 15.3 below

14.6 ***Leni Gas and Oil Investments Ltd. v. Malta Oil Pty Ltd.*** **[2014] EWHC 893 (Comm)**

"In a fraud case what matters is whether the defendant intended to make the implied statement in question and whether the claimant understood it as being made. These are subjective matters. Thus, if a defendant intended his words (even if they were ambiguous) to be understood in a certain way and if the claimant did so understand them, it would not matter whether a reasonable person in the claimant's position would (or even could) have understood the words in the same way." per Males J. at para 7

THE SUBJECTIVE TEST

14.7 Unusually, the test of inducement is subjective. i.e., It needs only to be proved that the *actual* party relied on the statement, not that it would have induced a reasonable person to enter the contract.[11]

14.8 ***Akerhielm v. de Mare*** **[1959] AC 789 (Privy Council, Eastern Africa)**

"The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made." per Lord Jenkins at p.805

14.9 However, if there is doubt about the inducement, and one can show, objectively, that a reasonable man would have been induced by the misrepresentation, this will obviously help the victim's case (and vice versa).

14.10 ***Smith v. Chadwick*** **(1884) 9 App.Cas.187**

"I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and if it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." per Lord Blackburn at p.196

14.11 ***Akerhielm v. de Mare*** **[1959] AC 789 (Privy Council, Eastern Africa)**

"This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true." per Lord Jenkins at p.805

14.12 The subjective test can work to the disadvantage of the claimant, if the court considers that subjectively he would not have been influenced by a particular statement, even if another reasonable person would have been so influenced.

See ***Drake v. Thos. Agnew & Sons Ltd.*** **[2000] EWHC 294** (para 8.1 above)

14.13 ***John Butler v. Elliot Nichol*** **[2006] EWHC 1652**

At the end of 1999, Nichol – a property investor - attempted to purchase an office block on Ruislip Road in Middlesex for £3,200,000 from Opecprime Properties Ltd. He paid a deposit of £319,800, and the completion date was agreed as December 8th 1999. Nichol obtained a loan for 90% of the balance, and sought investors for 50% of the remainder (£650,000.)

He was introduced to Butler, whom he induced to invest £200,000 in the scheme in return for a share of the profits.

[11] ***Museprimes Properties Ltd. v. Adhill Properties Ltd.*** **[1990] 36 EG 114.**

The vendors agreed to postpone completion until December 23rd. When Nichol was unable to find the remaining funds, the scheme collapsed, and Butler lost his investment.

He sued Nichol for the £200,000 plus interest on the basis that he had been induced to enter the scheme because of a misrepresentation that the remaining funds were in place so that there would be no problem with the completion. He also claimed that Nichol had failed to disclose several pertinent matters, such as the fact that the vendors required a payment of £200,000 as payment for postponing the completion date, so that all his investment had immediately been spent. Furthermore, he claimed that other – accurate – information he had been given about the risk of the investment was too complicated for him reasonably to have understood it.

The court held that there had been no misrepresentation. John Butler was an experienced businessman, and it was inconceivable that he would have invested £200,000 in a scheme based only on the limited information he claimed to have been given by Elliot Nichol.

"Mr. Butler affected, contrary to the impression one would have from his evident success in a competitive worldwide business, to be an innocent abroad in the sphere of property investment. I am completely satisfied that he was not at all an innocent abroad, but an experienced and sophisticated businessman. It defies belief that he would part with £200,000 at the request of a man he hardly knew in connection with a transaction which he barely understood; yet that is how he would have it. After just two meetings with Mr. Nichol, as he would say, on 6th and 9th December 1999, and having seen, as he asserted, no relevant paperwork, he agreed, he says, in a long-distance telephone conversation the day before Christmas, to transmit a large sum of money for a purpose which he did not understand. It was plain, in my judgment, that Mr. Butler well understood that the only two documents emanating from him in this whole affair did not support his claims and he sought to explain them away by invented and implausible accounts."

per HHJ Seymour at para 57

14.14 ***Springwell Navigation Corporation v. JP Morgan Chase Bank*** **[2010] EWCA Civ 1221**

Springwell, a trading company owned by the fabulously wealthy Polemis shipping family, invested heavily in Russian government bonds, having been advised by an agent of the Bank that they were a 'conservative' investment. The bonds fell sharply in value when the Russian government suspended trading in them, causing massive losses to Springwell. Springwell claimed that the loss was caused by reliance on the advice.

It was held *inter alia* that as Springwell was a sophisticated and knowledgeable investor, it was not at all likely that they would have relied on the vague opinions of the bank's agent in making such investments. In any case, Springwell was an aggressive trading company, not in the business of making 'conservative' investments, so they would not have been influenced by such an assurance anyway,[12]

[12] This is an interesting case about informed opinions as well.

15 THE STATEMENT MUST INDUCE THE MAKING OF THE CONTRACT

THE CLAIMANT UNAWARE OF THE MISREPRESENTATION

15.1 Where the claimant was not aware of the misrepresentation until after he made the contract, he cannot claim to have been induced by it.

15.2 ***Horsfall v. Thomas*** **(1862) 1 H&C 90**

The vendor of a cannon deliberately concealed a defect in it by inserting a metal plug into the chamber. The buyer did not examine the cannon, which flew to pieces after being fired six times. It was held that even if there had been a misrepresentation by conduct, as the buyer had purchased the cannon without examining it, the concealment of the defect could not have affected his decision to purchase it. His action therefore failed.[13]

15.3 ***Francis v. Knapper*** **[2016] EWHC 3093 (QB)**

Martin and Rebekah Francis, a married couple, operated a property development business. They bought Point Curlew Country Holiday Estate ('the Park'), which they renamed Atlantic Bays Holiday Park, a site of about 28 acres near Padstow in Cornwall. Having bought the premises, they discovered many faults with it, and claimed that they were induced to conclude the purchase by misrepresentations made by certain answers to pre-sale enquiries. Those enquiries were in a British Property Federation standard form, the Commercial Property Standard Enquiries CPSE.1 (version 2.6) ('the CPSEs').

These included the following statements by the seller:

i) The Park had not been affected by structural or inherent defects.

In fact, there was rot in the roof timbers of the amenity centre; the amenity centre walls were badly affected by damp and mildew; the Park had suffered from poor drainage leading on occasion to localised flooding in various parts of the chalet park and on the caravan park.

ii) The Park had not been affected by defective conduits, fixtures, plant or equipment

In fact, the main storm water drainage pipe that ran through the caravan park to the chalet park had collapsed some years before February 2008. This caused water to back up in the chalet park and was part of the drainage/flooding problem; some foul water drainage system manholes had no covers and some had ill-fitting covers so that the foul water system would flood with rain water, leading to foul water backing up through the manholes; the on-site sewage pump system, housed in its own small pump house at the Park, was inadequate for the needs of the site.

iii) The Property had not been affected by flooding except for one incident of flash flooding that caused damage to the site manager's flat and reception area that was covered by insurance

In fact, the Park, both in the caravan park and in the chalet park areas, had suffered from flooding problems for years.

iv) So far as the Vendor was aware, there were no items requiring significant expenditure within three years, in respect of any Conduits, fixtures, plant or equipment that were to remain part of the Park or that would serve the Park after completion.

In fact, the vendor was of the view that the amenity centre needed to be refurbished and re-roofed, and that the sewage system needed to be upgraded.

[13] Compare ***Gordon v. Sellico*** (1986**)** where the purchaser had examined the property but could not reasonably have discovered the fault because it had been so well concealed.

However, despite the untruth in these representations, the claimants' case failed because the evidence was that they had not read these answers, let alone relied on them. Mr Francis had clearly relied on what he considered to be his own expert and superior judgment by examining the park itself, and had not been induced by the - albeit untrue - answers on the CPSE.

"Under cross-examination, Mr and Mrs Francis both claimed to have gone through the CPSE answers with Mr Griffiths of Henriques Griffiths, face to face at a meeting. Mr Francis said he (no mention of Mrs Francis) went to Mr Griffiths' office for this, for a meeting that would have lasted half an hour to an hour, whereas Mrs Francis had it that Mr Griffiths came to see them both at home. To my mind, neither account rang true… Furthermore, it is entirely in keeping with Mr Francis' approach to this transaction, as I describe below, that at the time he had no real interest in the CPSEs…

"In my judgment, the freeholder's service charge entitlement was in fact the only consideration operating on Mr Francis' mind in deciding to buy, so far as concerns the physical condition of the Park and the degree to which work would be needed after acquisition. It may be he did not have a clear or full idea, when concluding the Agreement, that all of the work would be required that in the event he decided after purchase to undertake. But in my judgment that is not because he was misled by anything said by or on behalf of the Vendor about the condition of the Park or any need for work to be done to it. It is because it was not a matter of interest or concern to him. He visited the Park three times before entering into the Agreement: on a date shortly before 22 October 2006, he had a quick look round, with Mrs Francis, after which they went to find Mr Drummond (who was not on site at the time) and agreed with him that they would buy (minus the chalet park) for £1,600,000; he then visited with Mr Griffiths on 9 November 2007, spending several hours on site; at some point thereafter, but before withdrawing from that initial agreement in early December 2007, he stayed in one of the chalets, probably over a weekend, with Mrs Francis and their children. It was perfectly plain, and I am certain Mr Francis concluded, that the Park was rather tired and run down in parts – suffering, indeed, from long-term neglect. The amenity centre, as I mention further below, was most obviously in need of care and attention. He was a man who was happy to trust his own, experienced judgment as to the condition of the Park. In that respect, he was content to buy so long as, and his only interest was whether, such work as might prove to be necessary would be for the chalet owners' account." per Andrew Baker J. at paras 38 and 41

SEEKING OUTSIDE ADVICE

15.4 If someone seeks outside advice and then relies on it, he or she is no longer reliant on the original misrepresentation.

***Attwood v. Small* (1838) 6 Cl & F 232 (HL)**

X negotiated with Y to sell to them some mines and iron works. Y asked about the earning capacity of the property, but had the answers checked by their own experienced agents. These agents reported that the representations were accurate, and on the strength of this Y bought the property. In fact, they were grossly inaccurate, and Y sued X for misrepresentation. HELD: Y had not relied upon X's statements but on their own independent advisors, so the action for rescission failed.

15.5 However, a person cannot plead that his victim sought outside advice when the misrepresentation was fraudulent.

***S. Pearson & Son Ltd. v. Dublin Corporation* [1907] AC 351**

It was stated *obiter* that even where the buyer makes his own investigations, the seller will still be liable for misrepresentations which have been made fraudulently.

DECISION NOT AFFECTED BY THE MISPRESENTATION

15.6 If it is clear that the victim would have entered the contract whether or not the misrepresentation had been made, then the misrepresentation will not be operative.

15.7 ***J.E.B. Fasteners Ltd. v. Marks Bloom & Co*** **[1983] 1 All ER 583**

The plaintiffs took over a company after seeing its accounts, which were inaccurate. However, the reason for the takeover was to secure the services of two of its directors and the plaintiffs would have proceeded with the takeover even if the accounts had been accurate.

HELD: There was no liability for misrepresentation.

15.8 ***Welven Ltd. v. Soar Group Ltd.*** **[2011] EWHC 3240 (Comm)**

SGL contracted to buy shares in Soar Engineering Group Ltd. from Welven for £5.85 million. They paid the first instalment of £4.6 million, but refused to pay the remaining £1.25 million on the basis that the accounts of the company had been fraudulently misrepresented to them, and that their subsequent loss of profits was worth at least the outstanding amount on the purchase price.

The court held, *inter alia*, that even if there had been such misrepresentations (which there were not), they had not induced the purchase. The defendants bought the shares in reliance on their own valuation of the company's capital property, which they believed exceeded the purchase price. They knew – but were not unduly concerned - that the company was losing money and did not rely on the accounts to inform their purchase. They were therefore liable to pay the balance of the debt.

"While Mr Aughey (the Company Secretary of SGL) now alleges that he was induced to enter the SPA in reliance on alleged misrepresentations in relation to the accuracy of the Audited Accounts and the Management Accounts, the reality, in my judgment, is otherwise i.e., Mr Aughey was not induced by, and did not rely on, either the 2007 Audited Accounts or the Management Accounts when deciding to buy the Group. In particular, as I have already noted, Mr Aughey's accountants, CK, produced a set of financial projections which patently did not rely on either the 2007 Audited Accounts or the Management Accounts. Moreover, Mr Aughey purchased the Group knowing it was making substantial losses but (amongst other things) he relied on and was induced by the fact that he was obtaining the value of the properties, the Group's customer list, increased market share, a presence in the UK and strengthening his ability to compete with Mr McCabe. Mr Aughey was "convinced he can turn around the Soar business"."

per Eder J. at para 156

15.9 ***Leni Gas and Oil Investments Ltd. v. Malta Oil Pty Ltd*****. [2014] EWHC 893 (Comm)**

As well as holding that there had been no misrepresentation about the farm out negotiations, the court also held that even if Leni had known all the facts, it would still have sold its shares to Malta Oil, as it had been extremely keen to do so for a long time. Thus, the alleged misrepresentation was not what had induced them to sell.

KNOWING THE STATEMENT TO BE UNTRUE

15.10 If the victim knows that the statement is not true, he cannot claim to have been influenced by it.

15.11 ***Redgrave v. Hurd*** **(1881) 20 ChD 1 (CA)**

"In order to take away his title to be relieved from the contract on the grounds that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation."

per Sir George Jessel M.R.

15.12 ***Walsh v. Staines*** **[2009] C.P. Rep 16 (CA)**

Paul Staines and Martin Walsh, who had previously been business partners, were involved in prolonged litigation against each other after their business relationship broke down. In order to continue with the litigation, they each had to establish they were able to pay the possible damages.

To this end, Staines obtained a freezing order on Walsh's assets up to a limit of £180,000, which caused Walsh to have liquidity problems. In order to obtain this order, Staines had overstated own assets, especially the value of a flat and the extent of his mortgage and tax liabilities.

Walsh claimed that this deceit had led him not to challenge the freezing order, and he claimed against Staines for the losses he had therefore suffered because of this misrepresentation.

However, he admitted in evidence that he did not trust anything Staines said and had sent out several emails to him with such greetings as: "I'm going to grass you to the tax man – it's war!" Furthermore, he had written to Staines's lawyers to say: "As you are well aware tax evasion is a criminal offence and while previously you could hide behind "I was going on client's instructions" now you cannot. You are duty bound in your professional capacity to "know your client"! *Make no mistake this person is now insolvent and will be going bankrupt*, in which case he will not be able to pay my costs. What I have been trying to do for some time is break the doctor's club which operates in your profession and somehow put you in a position when he goes bankrupt to have a claim against your company insurance policy."

It was held that even though Staines had been deceitful to the court, this had clearly not influenced Walsh's subsequent actions as he never believed Staines in the first place. There was therefore no actionable misrepresentation.

15.13 ***Smith v. Headline Publishing Group Ltd.*** **[2011] EWHC 2106 (Ch)**

Amanda Smith – a former model who had endured a terrible life of abuse and addiction – submitted a sample of her personal memoirs to the publishers, Headline. They commissioned her to write the whole book under the title 'Toxic' as part of their 'misery genre' series. The contract contained a term requiring Smith not to write anything libellous. After the receipt of several drafts of the book, the publishers asked their solicitors – Mayer Brown – to advise them on any possible libel in the draft. (This is a common thing to do, but was somewhat late in the day in this case.) The solicitors sent a copy to a libel barrister, Kate Wilson, asking her to suggest any changes that might be necessary to ensure it was not libellous. Wilson replied that every other page contained libellous material and advised against publishing it at all. Mayer Brown duly sent a letter to Smith's agent – Simon Benham – advising him that Smith was in material breach of her contract, and that it would therefore be terminated.

Smith denied that the draft was libellous, claiming that she could verify everything in it, and that she had a right to tell her story under Articles 8 and 10 of the ECHR. She sued Headline for £1.8 million, claiming *inter alia*, for deceit, fraudulent misrepresentation and breach of contract. She did not use a lawyer, and acted as a litigant in person!

The alleged deceit was that Headline was looking for a way to get out of the contract because the 'misery genre' had peaked, and so had instructed Miss Wilson to falsify her report about the libel in the book. This claim was thrown out by the court.

The supposed misrepresentation was that by having the solicitor send a falsified letter to her agent, Headline was fraudulently misrepresenting the legal position to Smith to induce her to quit the contract and return her advance payment. Although the judge agreed that the solicitor's advice had not been entirely correct (albeit a reasonable opinion) the claim for even negligent misrepresentation would have failed because as Smith had made such a point of not believing what the letter said, she clearly did not rely on it.

"A plea of misrepresentation, whether negligent or fraudulent, can succeed only where the claimant has been induced in reliance on the representation to enter into an agreement or take other action which has caused her loss. In the present case, Ms. Smith makes it quite clear that she did not believe the representation and resisted taking any step in reliance on it to their detriment."

per Deputy Judge Bernard Livesey QC at para 136

Smith lost on most of her other grounds as well (including economic duress, restraint of trade, breach of copyright and negligence.) Her only arguable case was that by waiting so long to investigate the possible libel and to advise her on the potential problems, the publishers were in breach of their implied duty to take reasonable care and skill in handling their client, but this would hardly raise such damages as she was claiming. Furthermore, despite this limited success, the claimant was ordered to pay 65% of the legal costs. The claim has since been settled for an undisclosed sum.
Overall, the judge was not impressed by Ms Smith.

"The allegation made by Ms. Smith are ones which, if made by a barrister or solicitor, would result in censure by their professional bodies for breach of their professional duty, a liability which will pass by Ms. Smith as she is a litigant in person." para 158

16 THE DUTY TO CHECK INFORMATION

16.1 There is no general duty on a purchaser to check the accuracy of the statements made by the seller, even if given the opportunity to do so.

16.2 ***Redgrave v. Hurd* (1881) 20 ChD 1 (CA)**

A person was induced to buy a solicitor's practice and house by an innocent misrepresentation as to the value of the practice. He was allowed to rescind even though he had the opportunity of examining the accounts and so discovering the truth. A buyer is under no obligation to check the facts, even if given the opportunity to do so.

"If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say. 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer." per Lord Jessel M.R. at p.13

16.3 In ***McInerny v. Lloyds Bank Ltd.* [1974]** Lord Denning opined *obiter* that there were situations "when a man ought to have made an intermediate examination" of information supplied, though he did not elaborate on this, nor mention ***Redgrave v. Hurd***.

16.4 ***McInerny v. Lloyds Bank Ltd*. [1974] 1 Lloyd's Rep 246 (CA)**

"But there is yet another obstacle which Mr. McInerny cannot surmount. He ought not to have trusted to his own interpretation of the bank manager's reply. He ought to have taken it to his lawyers for their advice. After all, the request which was sent to the bank manager was drafted by his lawyers. He should have taken the reply to them so as to see whether it was good enough. If he had done so, they would, I should have thought, have pointed out to him: "This does not give the assurances which you want. It is all very well for the bank manager to say that you ought to be satisfied. But we do not think so". This failure by Mr. McInerny to consult his own lawyers is fatal to any claim by him against the bank.

"Ever since Donoghue v. Stevenson, [1932] A.C. 562, it has been clear that, when a man ought to have made an intermediate examination (which would have disclosed the defect) and does not do so, he cannot complain. Of course, it may be that Mr. McInerny did go to lawyers and they advised him wrongly. But, if so, his complaint is against them, not against the bank." per Lord Denning at p.254

16.5 However, in ***Smith v. Eric S. Bush*** **[1990] 1 AC 831**, the House of Lords suggested *obiter* that where a statement has not been made fraudulently, and it was unreasonable of the buyer not to check the information (notice the deliberate double-negative), then this might defeat a claim of innocent or negligent misrepresentation.

The case actually concerns the tort of Negligent Misstatement, and the comment is only *obiter*, but Treitel reckons that it should be of general applicability.

The issue is whether it is UNREASONABLE NOT to make enquiry, rather than whether it is REASONABLE TO make an enquiry. The double-negative is crucial.

If a person makes no effort to verify information when he could easily have done so, this might be an indication that he was not concerned with it (see above).

16.6 ***Smith v. Eric S. Bush*** **[1990] 1 AC 831 (HL)**

The plaintiffs bought a house with the aid of a mortgage, relying on a valuation which had been negligently conducted by the surveyor engaged by the lender. Their claim in negligence succeeded despite the fact that they could have discovered the truth by employing their own surveyor, for it was not reasonable to expect them to do this since the house in question was of modest value.

However, the House of Lords suggested *obiter dicta* that failure to make use of an opportunity to discover the truth **could** defeat a claim for negligent misrepresentation, but only where it is unreasonable for the representee not to make use of the opportunity.

16.7 ***Drake v. Thos. Agnew & Sons Ltd.*** **[2002] EWHC 294**

An art dealer did not check the provenance of a supposed van Dyck painting, even though he could easily have done so, because his only interest in purchasing the painting was to earn a large commission from an art collector who wanted an Old Master, and the dealer was quite prepared to defraud him if necessary. It was held that he had not relied on the statement by the seller about the provenance. (In fact, it was also held that the statement by the seller had been a mere opinion anyway.)

"If, contrary to the finding he did not look at the 1996 Edition of the Art Sales Index having checked the 1994 Edition and discovered the other sale, the irresistible conclusion would be that he chose not to because he was determined that the sale should go through and earn him his commission. Thus, either way, reliance could not be established in relation to the auction allegation." per Buckley J. at para. 37

17 INFORMATION FROM A THIRD PARTY

17.1 A person may rely on a misrepresentation even though it was not made directly to him, if it was the intention of the representor that the information would be used to induce a contract. (e.g., **Smith v. Eric S. Bush [1990] 1 AC 831** (HL)).

17.2 When A by a misrepresentation induces B to buy something, and B then repeats the lie to induce C to buy it, the misrepresentation will be considered "spent" so that C cannot sue A (***Gross v. Lewis Hillman Ltd.*** **[1970] Ch 445**), unless C can show that A knew that B intended to resell and was likely to repeat the misrepresentation in order to do so. (***The Sennar (No 2)*** **[1985] 1 WLR 490)**

18 REMEDIES FOR MISREPRESENTATION: INTRODUCTION

18.1 The remedies available for misrepresentation depend to some extent on the state of mind of the maker of the statement. There are three possibilities: -

Fraudulent Misrepresentation: A statement which is known to be false, or made without belief in its truth, or recklessly, not caring whether it is true or false. The usual remedies for this would be rescission of the contract; damages for common law deceit; and damages under the Misrepresentation Act 1967, s.2 (1).

Negligent Misrepresentation: A statement made by a person believing it to be true but with no reasonable grounds for that belief. The usual remedies for this would be rescission of the contract; damages for common law negligence; and damages under the Misrepresentation Act 1967, s.2 (1).

Innocent Misrepresentation: A statement which the maker honestly and reasonably believes to be true. The usual remedies for this would be rescission of the contract, or damages in lieu of rescission under the Misrepresentation Act 1967, s.2 (2). Compensatory damages are not available at common law.

19 REMEDIES FOR MISREPRESENTATION: RESCISSION

RESCISSION IS THE USUAL REMEDY FOR MISREPRESENTATION

19.1 ***Salt v. Stratstone Specialist Ltd. t/a Stratstone Cadillac Newcastle*** **[2015] EWCA Civ 745**

"The normal remedy for misrepresentation is rescission… This remedy should be awarded if possible, particularly perhaps in a case in which a defendant makes no attempt to prove that he had reasonable grounds to believe its representation was true." per Longmore L.J. at para 24

THE DEFINITION OF RESCISSION

19.2 "Rescission for misrepresentation amounts to setting the contract aside for all purposes so as to restore, as far as possible, the state of things which existed before the contract." (Treitel)

19.3 In practical terms, this means that the goods (or whatever) are returned to the seller in return for the purchase price. This is known as 'counter restitution' – previously known as 'restitutio in integrum'.

19.4 Note that this is not the same as damages, which would be additional compensation for the harm done by the misrepresentation. This is discussed below.

THE AVAILABILITY OF RESCISSION

19.5 The remedy of rescission is available at common law only for fraudulent misrepresentation, but in equity it is available for <u>all</u> types of misrepresentation at the discretion of the court. Since the equitable rule now prevails, there is little practical difference between claiming rescission for fraud and claiming rescission for negligent and innocent misrepresentation.

THE OPERATION OF RESCISSION

19.6 Misrepresentation makes the contract VOIDABLE at the option of the representee.[14] This means that the contract is VALID unless and until the contract is AVOIDED. This has important implications if property is acquired under a voidable contract which is then transferred to an innocent third party. If the contract has not been avoided at the time of the transfer, the third party will take good title to the property, so it will be impossible to restore the property to the original victim of the misrepresentation.

[14] ***Clough v. L & NW Ry.*** **(1871) LR 7 Ex 26**

19.7 When a contract is voidable, it will generally be valid until the other party is informed of the avoidance. However, where the seller has the right to avoid for fraud he does so if he takes all reasonable steps to recover the goods.

19.8 ***Car and Universal Finance v. Caldwell*** **[1965] 1 QB 525**

A person was induced by fraud to sell his car to a crook. The crook's cheque was dishonoured and the former owner informed the police and the A.A. and asked them to find his car. HELD: He had done all he could to avoid the contract and it was therefore successfully avoided. An innocent third party who later bought the car did not get good title.

20 REMEDIES FOR MISREPRESENTATION: BARS TO RESCISSION

20.1 The right to rescind a contract may be barred by various factors.

BARS TO RESCISSION: AFFIRMATION

20.2 If the innocent party, with knowledge of his rights, affirms the contract, rescission is not possible.

20.3 ***Long v. Lloyd*** **[1958] 1 WLR 753 (CA)**

P was induced to buy a lorry from D after hearing representations as to its condition and a statement that it would do eleven miles to the gallon. P drove the lorry from Hampton Court to Sevenoaks. The next Wednesday he drove to Rochester, whereupon the dynamo ceased to function, an oil leak developed, a crack appeared in one of the wheels and the petrol consumption was 5 miles per gallon. He complained to D who offered to pay half the cost of new dynamo, and this offer was accepted. The next day the lorry broke down *en route* to Middlesbrough and P asked for his money back.

HELD:

1. The representations were innocent;
2. The journey to Rochester was not affirmation since P had to have an opportunity to test the vehicle;
3. The acceptance of the money and the subsequent journey to Middlesbrough did amount to affirmation, and so rescission could not be granted.

BARS TO RESCISSION: COUNTER RESTITUTION NOT POSSIBLE

20.4 If restoration to the pre-contract state of affairs is impossible, rescission will not be permitted.

20.5 ***Clarke v. Dickson*** **(1858) EB&E 148**

Clarke bought shares in a mining company as a result of false representations made to him by the directors. The company was wound up three years later, and Clarke sought to rescind the contract on the basis of the misrepresentations.

HELD: He could not do so, as the nature of the shares had been varied since he had bought them so he could not restore them in the same state as when he bought them. *Inter alia*, he had bought shares in a company on the cost book principle (equivalent to a modern partnership) and they had been converted into shares in a joint stock corporation (equivalent to a limited company).

20.6 ***Crystal Palace FC (2000) Ltd. v. Iain Dowie*** **[2007] IRLR 682 (QB)**

Dowie was the manager of Crystal Palace FC under a contract which was set to run from December 26th 2003 until June 30th 2008. In this contract there was a 'Compensation Clause' that provided that if Dowie should leave earlier to work for another football club, he would have to pay Palace £1,000,000

In May 2006, after a disastrous season, Palace failed to win promotion to the Premiership and Dowie negotiated an early termination of his contract through a Compromise Agreement which let him off the £1,000,000 payment.

Palace agreed to let Dowie leave without paying the £1,000,000 on the basis that he would not work for a rival team in London, especially not the hated Charlton Athletic, who had dared to score a goal against them in the vital last game of the season.

Dowie assured Palace that he planned to move to the North of England for family reasons, and that he had no interest or intention of working for Charlton Athletic. Lies! He had already had been invited to attend interview with Charlton and intended to join them as soon as he was free of his Palace contract. This became evident when he did just that.

Palace successfully sued Dowie for misrepresentation and claimed rescission of the Compromise Agreement and a consequent revival of the Compensation Clause.

The court held that rescission was not possible, as this would mean that Dowie would be once again employed as Palace's manager, despite the fact that no-one wanted that and that it was, in any case, impossible as he was now employed by Charlton. A contract could not be selectively rescinded.

However, Tugendhat J. indicated that a simple award of damages – if properly pleaded – could achieve the desired effect of making Dowie pay up for his fraud.[15]

20.7 A mere reduction in the value of the contract goods will not prevent a rescission.

20.8 ***Armstrong v. Jackson*** **[1917] 2 KB 822**

Armstrong instructed his broker, Jackson, to purchase for him 600 shares in Champion Gold Reefs of West Africa Ltd. Armstrong sent Jackson a letter to confirm that his order had been carried out. Armstrong did not immediately take up the shares, and became anxious when their value began to fall. However, Jackson advised him to go through with the transfer, and Armstrong did so. It then transpired that Jackson had not purchased the shares for Armstrong at all, but had merely sold him his own shares in order to off-load them.

Armstrong sought rescission, but Jackson argued that as the value of the shares had fallen from nearly £3 to only 5 shillings, rescission was not possible.

HELD: A sale may be rescinded notwithstanding that the value of the thing sold has decreased between the date of sale and the date of the action for rescission.

"The phrase 'restitutio in integrum' is somewhat vague. It must be applied with care. It must be considered with respect to the facts of each case. Deterioration of the subject-matter does not, I think, destroy the right to rescind nor prevent a restitutio in integrum. Indeed, it is only in cases where the plaintiff has sustained loss by the inferiority of the subject-matter or a substantial fall in its value that he will desire to exert his power of rescission." per McCardle J. at p.829

20.9 ***Cheese v. Thomas*** **[1994] All ER 35 (CA)**

A contract was rescinded on the grounds of undue influence. A man and his great-nephew bought a house together, with the great-uncle paying £43,000 and the great-nephew paying £40,000. The value of the house had decreased, and on the sale of the house the uncle (the victim) demanded the return of the full amount of his investment. It was held that the purpose of rescission was to return <u>all</u> the parties, as closely as possible, to their original positions. Therefore, the recovered money was ordered to be returned in the proportions in which it had been invested, i.e., 43:40.

[15] Dowie's career at Charlton was short-lived. Within months he had been sacked and went on to be sacked from Coventry City, Queens Park Rangers and Newcastle United.

BARS TO RESCISSION: LAPSE OF TIME

20.10 Where the misrepresentation is innocent or negligent, a claim must be made within a reasonable time.

20.11 ***Leaf v. International Galleries*** **[1950] 2 KB 86 (CA)**[16]

In 1944, Ernest Louis Leaf was induced to buy a painting of Salisbury Cathedral for £85 by an innocent misrepresentation that it was by Constable. Five years later – when he tried to sell it - he discovered the truth and claimed rescission.

HELD: His claim was barred by lapse of time.

20.12 Where the misrepresentation is fraudulent, a claim must be made within six years from the discovery of the fraud, but until the fraud is discovered there is no time limit.

Armstrong v. Jackson **[1917] 2 KB 822** (see 20.8 above)

"I may point out that mere lapse of time is no answer to a plea of rescission. Here some six years elapsed before the plaintiff claimed to rescind. But in Rothschild v. Brookman and in Oelkers v. Ellis six years had also elapsed; and in York Buildings Co. v. Mackenzie eleven years had elapsed, in Gillet v. Peppercorne fourteen years had elapsed, and in Oliver v. Court fifteen years had elapsed before the plaintiffs respectively commenced their proceedings to set aside the transaction complained of. In cases like the present the right of the party defrauded is not affected by the mere lapse of time so long as he remains ignorant of the fraud…If, however, he delays his claim to rescission until after the lapse of six years from the discovery of the fraud, the Court will (apart from any other point) act by analogy the Statute of Limitations and refuse to grant relief." per McCardle J. at p.830

BARS TO RESCISSION: THIRD PARTY RIGHTS

20.13 If an innocent third party has gained rights to the property then it cannot be restored if to do so would compromise those rights.

21 DAMAGES FOR FRAUDULENT MISREPRESENTATION AT COMMON LAW

21.1 At common law, damages are available for fraudulent misrepresentation under the tort of deceit. The definition of deceit/fraud comes from the case of ***Derry v. Peek***.

21.2 ***William Derry and Others v. Sir Henry William Peek, Baronet*** **(1889) 14 App Cas 337 (HL)**

A company advertised shares for sale stating that it had permission to run steam trains. In fact, it did not, but the directors honestly believed that permission from the Board of Trade would be forthcoming, so they were held not liable for fraud.

"I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false." per Lord Herschell at p.374

21.3 The main problem with bringing an action for fraudulent misrepresentation is that it is notoriously difficult to prove. In ***LPMG Ltd. v. Stapleford Commercials*** **[2006] All ER (D) 196** the court noted that where there is an allegation of fraud, the court must start on the basis that it is inherently improbable that the act had occurred, and so require cogent evidence to persuade it otherwise.

[16] This case was considered to be out-of-date on some issues in ***Salt v. Stratstone Specialist Ltd*** **[2015] EWCA Civ 745**

21.4 Furthermore, it was held in ***Akerhielm v. de Mare*** **[1959] AC 789** that if a defendant has been acquitted of fraud in a court of first instance, the decision in his favour should not be displaced on appeal except on the clearest grounds. This ruling was applied by the Court of Appeal in ***Foster v. Action Aviation*** **[2014] EWCA Civ 1368**.

21.5 There has also been some debate about the correct measure of damages for deceit, but it now seems to cover all losses which can be shown to be the consequence of the false statement, whether or not these were foreseeable.

21.6 A particular problem is raised when something is purchased at an inflated price due to a misrepresentation as to its value. The victim is entitled to damages representing the difference between the contract price and the market value, but at what point is the 'market value' to be assessed? What if the value of the asset has decreased even more since the time of the contract? Can the victim claim for the loss suffered by the extra decrease in value, or simply the loss at the time of the transaction?

21.7 In ***Doyle v. Olby (Ironmongers) Ltd.*** **[1969] 2 QB (CA)**, the Court of Appeal set aside the Victorian rule that damages must be assessed as at the time of the transaction and allowed extra damages for the loss suffered on a later resale.

21.8 This was followed in ***East v. Maurer*** **[1991] 2 All ER 733 (CA)** and confirmed by the House of Lords in ***Smith and New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*** **[1997] AC 254**

21.9 ***Doyle v. Olby (Ironmongers) Ltd.*** **[1969] 2 QB (CA)**

Herbert Doyle bought an ironmongers' business from Olby (Ironmongers) Ltd. having been told *inter alia* by the director, Leslie Morton Olby, that all of its substantial profits were made over the counter. This was not true, as half the trade had been obtained by the director's brother, Cecil Augustus Olby, acting as a part-time travelling salesman. Furthermore, in breach of contract, the vendors set up a rival business in the same district. After three years of disastrous trading, Doyle sold the business, but was left with liabilities of some £4,000. The Olby brothers were found to be liable for fraud and conspiracy and (despite some negligent pleading by Doyle's barrister) Doyle was entitled to full damages for deceit.

Lord Denning explained how these were to be assessed: *"In contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it.*

"In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:-

"'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages. All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

per Denning LJ at p.167

21.10 ***East v. Maurer*** **[1991] 2 All ER 733 (CA)**

Roger Maurer was a renowned hairdresser who owned and managed two successful salons in Bournemouth under the name of Roger de Paris. In 1979, Terence and Janet East bought one of the salons for £20,000, having been induced in part by a representation that Maurer had no intention of working in the other salon except in emergencies and was planning to open a salon abroad. In fact, he continued to work full-time in the other salon, and, as a result, East's business was never profitable, and they were forced to sell in 1989 for £7,500.

The judge found Maurer liable for fraudulent misrepresentation and awarded damages of £33,328 to East consisting of separate awards for the loss incurred on the sale of the business; fees and expenses incurred in buying and selling the business and making improvements; trading losses incurred by the plaintiffs; disappointment and inconvenience, and an award of £15,000 for loss of profits based on the profits which the defendant would have made from the salon if he had not sold it, less a 25% deduction for the plaintiff's lesser experience. The defendant appealed against the award for loss of profits, claiming that these were only available in an action for breach of contract.

HELD: Loss of profits *could* be recovered in an action for deceit, but they were not to be assessed on the same basis as contractual damages. They should be to compensate the plaintiff for the loss he has suffered because of the deceit and not to put him in as good a position as he would have been in had the statement been true (i.e., If Maurer really had left town!)

Thus, the judge had assessed the damages on the wrong basis. The proper approach was to assess the profit the plaintiffs might have made if the false representation had not been made and the Easts had therefore not bought Maurer's salon but had bought another salon instead. Therefore, they could recover the profit they might have expected to make in another hairdressing business bought for a similar sum.

On that basis the appropriate measure of damages for loss of profits was £10,000 not £15,000.

"It seems to me that (the judge) should have begun by considering the kind of profit which the second plaintiff might have made if the representation which induced her to buy the business at Exeter Road had not been made, and that involved considering the kind of profits which she might have expected to make in another hairdressing business bought for a similar sum. Mr. Nicholson has argued that on the evidence of Mr. Knowles, an experienced accountant, the learned judge could have arrived at the same or an equivalent figure on that basis. I do not agree. the learned judge left out of account the fact that the second plaintiff was moving into an entirely different area and one in which she was, comparatively speaking, a stranger; secondly, that she was going to deal with a different clientele; and, thirdly, that there were almost certainly in that area of Bournemouth other smart hairdressing salons which represented competition and which, in any event, if the first defendant had, as he had represented, gone to open a salon on the continent, could have attracted the custom of his former clients." per Beldham L.J. at p.738

21.11 ***Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*** **[1997] AC 254**

SNC were tricked into buying 28,141,424 shares in Ferranti for 82.25 pence per share by a fraudulent misrepresentation (made by the broker for the bank who owned the shares) that there were other bidders interested who had offered 81 pence per share. The market value of the shares on the day of the sale was actually 78 pence, but unknown to either the buyers or the sellers at the time of the sale, Ferranti was itself the victim of on ongoing fraud which made the actual value of the shares only 44 pence per share. SNC kept the shares for several months after the Ferranti fraud was discovered in the hope of recouping their loss, but eventually sold them at a loss of £11,353,220.

SNC claimed this loss in damages against the bank, it being the difference in value between the price they paid and the actual value of the shares (i.e., 82.25 minus 44). The bank claimed to be liable only for the difference between the price paid and the market value on the day (i.e., 82.25 minus 78) as they said that the rest of the loss was not their responsibility. The Court of Appeal accepted the bank's argument based on the old rule that damages must be assessed as at the date of the transaction, when the shares could have been sold for 78 pence.

The House of Lords, whilst accepting that the "transaction date assessment" was the normal rule, held that it did not apply here. Upholding the decision in Doyle v. Olby, they said that damages for fraud must include ALL the loss flowing from the fraud, even if it was not foreseeable. Without the broker's fraud, SNC would not have bought the shares at an inflated price. Having bought them at more than market value, it was not unreasonable to keep them in the hope that the value would rise, and in keeping them they suffered the effects of the Ferranti fraud being discovered. They had been fraudulently induced into buying shares which were "pregnant with loss", and the fraudulent party was to suffer all the consequences.

"The following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property.

(1) The defendant is bound to make reparation for all the damage directly flowing from the transaction.
(2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction.

(3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction.

(4) As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such a general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered.

(5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.

(6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction.

(7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."
per Lord Browne-Wilkinson at p.778

22 DAMAGES FOR NEGLIGENT MISREPRESENTATION AT COMMON LAW

22.1 Since ***Hedley Byrne & Co Ltd. v. Heller and Partners Ltd.*** **(1964)**, it has been possible to recover damages for a negligent misstatement, but this tort is of limited application.

22.2 ***Hedley Byrne & Co Ltd. v. Heller and Partners Ltd.*** **[1964] AC 465**[17]

HB were a firm of advertising agents who wanted to know whether one of their clients was creditworthy. They asked their own bank, the National Provincial, to make enquiries, and the bank inquired of Heller, the client's bank. They were told "in confidence and without responsibility on our part" that the clients were good for £100,000 a year. HB relied on this statement and lost more than £17,000 when the client went into liquidation. They sued Heller for negligence.

HELD: The words used by Heller meant that they accepted no liability for their statements and so were not liable. However, the House of Lords said *obiter* that where A in the ordinary course of business asks B for information, when it is clear that A is relying on B to exercise a reasonable degree of care in answering, and B knew or ought to have known that A was relying on him, then B will be under a duty to take reasonable care.

22.3 Liability (and thus damages) for negligence is based on the criterion of reasonable foreseeability.

Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.: The Wagon Mound **[1961] AC 388 (PC)**

"If it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done. Thus, foreseeability becomes the effective test." per Viscount Simonds at p.426

[17] See also ***Caparo v. Dickman*** **[1990] 2 AC 605.**

23 DAMAGES FOR INNOCENT MISREPRESENTATION AT COMMON LAW

23.1 There is no common law remedy for innocent misrepresentation, as there is no tort of innocence! It may be possible however to claim limited damages under the Misrepresentation Act 1967 s.2(2) as discussed below

24 DAMAGES UNDER THE MISREPRESENTATION ACT 1967, S.2(1)

24.1 **MISREPRESENTATION ACT 1967 s.2 (1)**

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.

24.2 This provision has revolutionised actions for misrepresentation. It makes a presumption that ALL misrepresentations are fraudulent, and unless the defendant can prove that he reasonably believed what he said (i.e., that he was INNOCENT), then he must pay damages as if for deceit.

24.3 The statute does not recognise NEGLIGENT MISREPRESENTATION as a category, so it is treated the same as FRAUDULENT MISREPRESENTATION.

24.4 Thus, the statute makes two major changes to the law.

1) The victim of a misrepresentation may claim damages for FRAUDULENT misrepresentation, even though he has not proved fraud.

2) The victim of a misrepresentation need not even establish negligence. Once he has established that there has been a misrepresentation, it is up to the maker of the statement to prove that it was innocent. Thus, the burden of proof is reversed.

24.5 ***Howard Marine and Dredging Co. Ltd. v. A. Ogden and Sons (Excavations) Ltd.*** **[1978] QB 574 (CA)**

"If the representee proves a misrepresentation which, if fraudulent, would have sounded in damages, the onus passes immediately to the representor to prove that he had reasonable grounds to believe the facts represented." per Bridge L.J. at p.596

25 DAMAGES UNDER THE MISREPRESENTATION ACT 1967, S.2(2)

25.1 **MISREPRESENTATION ACT s.2 (2)**

Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

25.2 The significance of this section is that, except for this provision, there is no power for a court to award damages "in lieu of rescission". Thus, this is the only way one could get damages for innocent misrepresentation.

WHAT DOES 'IN LIEU OF RESCISSION' MEAN?

25.3 First, one should note that as the damages must be "in lieu" of rescission, one cannot claim both rescission **and** damages under s.2(2), as one can under s.2(1). Furthermore, the award of damages under s.2(2) is at the discretion of the judge, whereas under s.2(1) damages may be claimed as of right.

25.4 Second, it seems that a court can only award damages as a direct replacement for rescission. Thus, if rescission is barred, then damages will be barred also.

25.5 ***Salt v. Stratstone Specialist Ltd. t/a Stratstone Cadillac Newcastle*** **[2015] EWCA Civ 745**

"The words of the statute are "if it is claimed… that the contract ought to be or has been rescinded the court … may declare the contract subsisting and award damages in lieu of rescission". No doubt a claimant can be said to make a claim even if he is subsequently held not to be entitled to do so. But the words "in lieu of rescission" must, in my view, carry with them the implication that rescission is available (or was available at the time the contract was rescinded). If it is not (or was not available in law) because e.g., the contract has been affirmed, third party rights have intervened, an excessive time has elapsed or restitution has become impossible, rescission is not available and damages cannot be said to be awarded "in lieu of rescission." per Longmore L.J. at para 17

25.6 This overrules the contrary decision in ***Thomas Witter Ltd. v. TBP Industries Ltd.*** **[1996] 2 All ER 573**

WHEN WILL SUCH DAMAGES BE AWARDED?

25.7 **Anson. 27th Edition p.252**

"The reason for this provision is that rescission in some situations may be too drastic a remedy; for example, a car might be returned to the vendor because of a trifling misrepresentation about the mileage done since the engine was last over-hauled. Section 2(2) allows the Court to take into account the relative importance or unimportance of the facts which have been misrepresented. It also allows the Court to take into account the relationship of the loss caused to the representee by the misrepresentation and the loss which would be caused to the representor if the contract is rescinded. Where the former is significantly less than the latter it is likely that damages in lieu of rescission will be awarded."

WHAT IS THE MEASURE OF DAMAGES UNDER S.2(2)?

25.8 It is clear from s.2(3) that damages under s.2(2) are likely to be less than under s.2(1). Thus, one may assume that they cannot be assessed on the same basis. In particular, there should be no account taken of consequential loss, since this would go beyond the scope of replacing the value of the rescission.

25.9 **MISREPRESENTATION ACT 1967 s.2 (3)**

Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under subsection (1) thereof, but where he is so liable any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1).

25.10 ***William Sindall plc v. Cambridgeshire County Council*** **[1994] 1 WLR 1016 (CA)**

The council failed to disclose the presence of a sewer under some development land it had sold. The cost of diverting the sewer would have been £18,000. The cost of rescission to the council would have been £6,000,000. In fact, the council were held not to be liable for misrepresentation anyway, but the Court of Appeal indicated *obiter* that had they been, this would have been a case for damages in lieu of rescission under s.2(2).

The court discussed the measure of those damages which they held would not have been assessed under the s.2(1) test.

"Under section 2(1), the measure of damages is the same as for fraudulent misrepresentation, i.e., all loss caused by the plaintiff having been induced to enter into the contract. This means that the misrepresentor is invariably deprived of the benefit of the bargain (e.g., any difference between the price paid and the value of the thing sold) and may have to pay additional damages for consequential loss suffered by the representee on account of having entered into the contract. In my judgment, however, it is clear that this will not necessarily be the measure of damages under section 2(2).

"First, section 2(1) provides for damages to be awarded to a person who "has entered into a contract after a misrepresentation has been made to him by another party and as a result thereof" - sc. of having entered into the contract - "he has suffered loss." In contrast, section 2(2) speaks of "the loss which would be caused by it" - sc. the misrepresentation - "if the contract were upheld." In my view, section 2(1) is concerned with the damage flowing from having entered into the contract, while section 2(2) is concerned with damage caused by the property not being what it was represented to be.

"Secondly, section 2(3) contemplates that damages under section 2(2) may be less than damages under section 2(1) and should be taken into account when assessing damages under section 2(1). This only makes sense if the measure of damages may be different...Damages under section 2(2) should never exceed the sum which would have been awarded if the representation had been a warranty."

per Hoffmann L.J. at p.1037

26 LIMITATION OF DAMAGES UNDER S.3

26.1 **MISREPRESENTATION ACT 1967 s.3**

If a contract contains a term which would exclude or restrict

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does**.**

26.2 A term which purports to exclude liability for fraudulent misrepresentation will always be construed as unreasonable and so void.

***Government of Zanzibar v. British Aerospace Ltd.* [2000] 1 WLR 2333**

26.3 However, if a term could technically cover fraudulent, negligent and innocent misrepresentation, it may still be valid (if otherwise reasonable) just to cover negligent and innocent misrepresentation.

26.4 ***Six Continents Hotel Inc. v. Event Hotels GmbH* [2006] EWHC 231**

It was stated *obiter* that an 'Entire Agreement' clause was valid to exclude liability for innocent and negligent misrepresentation only, even though, the way it was worded, it would seem to be (unlawfully) excluding liability for *all* misrepresentations.

The term in question was as follows: "**Entire Agreement - This Agreement (together with the Application Letter Agreement signed by the parties in anticipation of this Agreement) supersede all prior written or verbal commitments, representations and warranties between the parties and constitute the entire Agreement between the parties with respect to the subject matter hereof"**

26.5 The issue of reasonableness was discussed in:

Avrora Fine Arts Investment v. Christie Manson & Woods **[2012] EWHC 2198 (Ch)**

After considering s.11 and Schedule 2 of UCTA 1977 (in paras 147 onwards), Newey J. held that it was **reasonable** for Christie's to exclude liability for negligently misrepresenting the attribution of a painting. *Inter alia*, he noted that:

(a) Christie's did not leave the purchaser of a misattributed work of art without any remedy. The purchaser was still entitled to a full refund of the purchase price under the warranty, without even having to establish fault by Christie's;

(b) Avrora was the vehicle for a wealthy businessman with no economic imperative to deal with the defendants; and

(c) The fact that, because sums paid were returned without interest, the purchaser might be out of pocket was not as such unreasonable.

PART TWO: FRUSTRATION

I: BASIC CONCEPTS OF FRUSTRATION

27 HISTORICAL BACKGROUND

27.1 Historically, once a contract was made it could only be terminated by performance or breach. This was known as the theory of absolute contracts.

27.2 ***Paradine v. Jane* 1647**

A man had to pay rent on a property despite having been dispossessed by Prince Rupert of Germany.

27.3 This theory was overturned in 1863, in favour of a theory that contracts contained an implied term that if they became impossible to perform through no fault of the parties, they would be discharged by frustration.

27.4 ***Taylor v. Caldwell* (1863) 3 B&S 826**

The defendants rented Surrey Gardens and a Music Hall to the plaintiffs to give four grand concerts and fetes. Before the first of these, the Hall was destroyed by fire and the plaintiffs sued the defendants for breach of contract for failing to supply the Hall. It was held that the contract was subject to an implied condition that the parties would be excused from performance of the contract if the subject matter were destroyed by no fault of the parties. As this is what had occurred, the contract was frustrated and the parties were released from liability.

"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible… But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there… the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." per Blackburn J.

27.5 Although the theory of an implied term as to discharge no longer holds sway, the doctrine of frustration has survived as an independent principle.

28 THE CRITERIA FOR FRUSTRATION

28.1 In order for a contract to be frustrated, the following conditions must be met:

1. There must be an unforeseen event…
2. after the contract has been made…
3. which is the fault of neither party…
4. which makes performance of the contract impossible…or
5. which makes performance of the contract illegal…or
6. which makes the obligations under the contract radically different from those originally contemplated by the parties

28.2 ***National Carriers Ltd. v. Panalpina (Northern) Ltd.*** **[1981] AC 675 (HL)**

"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares both parties to be discharged from further performance." per Lord Simon at p.728

28.3 ***Paal Wilson A/S v. Hannah Blumenthal*** **[1983] 1 AC 854 (HL)**

"There are two essential factors which must be present in order to frustrate a contract. The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside events or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without either the fault or the default of either party to the contract." per Lord Brandon at p.909

28.4 The leading authority on the doctrine of frustration is ***Davis Contractors Ltd. v. Fareham Urban District Council*** **[1956]**

28.5 ***Davis Contractors Ltd. v. Fareham Urban District Council*** **[1956] AC 696 (HL)**

Building contractors incurred massive expenses of £17,651 [£295,289] when, due to labour shortages, a job took twenty-two months instead of the expected eight. They claimed that the contract had been frustrated by reason of the long delay, and that they were entitled to a sum in excess of the contract price on a *quantum meruit* basis. The House of Lords rejected their claim that the contract was frustrated.

"The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purposes of deciding that contractual obligations, ex facie binding, are no longer enforceable against the parties." per Lord Radcliffe at p.727

"Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract…" per Lord Radcliffe at p.729

The building contractors lost in this case because the unexpected labour shortages had simply made the contract become more expensive, not radically different.

"It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for." per Lord Radcliffe at p.729

"Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been made the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each… To my mind it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it is a misuse of legal terms to call in frustration to get him out of his unfortunate predicament."

per Lord Radcliffe at p.731

28.6 Later cases further developed the doctrine, as summarised in ***Lauritzen A.S. v. Wijsmuller B.V: The Super Servant Two*** **[1990]**

28.7 ***Lauritzen A.S. v. Wijsmuller B.V: The Super Servant Two*** **[1990] 1 Lloyd's Rep 1 (CA)**

"Certain propositions, established by the highest authority, are not open to question:

i. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.

ii. Since the effect of frustration is to kill the contract and to discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.

iii. Frustration brings the contract to an end forthwith, without more and automatically.

iv. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.

v. *A frustrating event must take place without blame or fault on the side of the party seeking to rely on it."*

per Bingham L.J. at p.8

28.8 ***Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd: The Sea Angel*** **[2007] 2 Lloyd's Rep. 517 (CA)**

"In my judgment, the application of the doctrine of frustration requires a multifactorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

"What the 'radically different' test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice.

"Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind." per Rix L.J. at paras 111 and 112

29 A RESTRICTED DOCTRINE

29.1 The courts have emphasised that the doctrine of frustration operates within very narrow confines, and so should be an exceptional occurrence. The usual presumption is therefore that a contract has NOT been frustrated.

29.2 ***Lauritzen A.S. v. Wijsmuller B.V: The Super Servant Two:*** **[1990] 1 Lloyd's Rep 1 (CA)**

"*Since the effect of frustration is to kill the contract and to discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended."*

29.3 ***Gold Group Properties Ltd. v. BDW Trading Ltd. (formerly Barratt Homes Ltd.)*** **[2010] EWHC 323 (TCC)**

"In the modern day, the Courts have repeatedly said that the doctrine of frustration operates within narrow confines. In *Pioneer Shipping Limited v. BTP Tioxide Limited (The Nema)* [1982] AC 724 at 752, it was stressed that frustration is "not likely to be invoked to relieve contracting parties of *the normal consequences of imprudent commercial bargains". Again, this echoes Lord Radcliffe in Davis who said that "frustration is not to be lightly invoked as the dissolvent of a contract".* per Coulson J. at para 68

30 A QUESTION OF LAW AND OF FACT

30.1 The cases have illustrated certain types of event that may frustrate the contract as a matter of *law*. Once you have identified such an event, you need to decide whether, in *fact,* it does frustrate the particular contract in question.

30.2 ***Davis Contractors Ltd. v. Fareham Urban District Council*** **[1956] AC 696 (HL)**

"The description of the circumstances that justify the application of the rule and, consequently, the decision whether in a particular case those circumstances exist are, I think, necessarily questions of law." per Lord Radcliffe at p.727

30.3 ***F.C. Shepherd & Co. Ltd. v. Jerrom*** **[1987] QB 301 (CA)**

"Whether a particular event is capable of frustrating a contract is a matter of law… Whether a particular event does frustrate the contract in question is a question of fact." per Balcombe L.J. at p.725

31 THE LEGAL EFFECT OF FRUSTRATION

31.1 The effect of frustration is automatically to discharge the contract at the time of the event. This happens as a matter of law, whether or not that is the desire of the parties.

31.2 ***Islamic Republic of Iran Shipping Lines v. Steamship Mutual Underwriting Association (Bermuda) Limited*** **[2010] EWHC 2661 (Comm)**

"Frustration operates automatically and does not depend on choice." per Beatson, J. at para 119

31.3 ***Collins v. Secretary of State for Trade and Industry*** **[2001] 31.1.2001 (EAT)**

Collins worked for a transport company as a driver, and was injured in February 1996, receiving severe injuries to his left hand. For two years, although not fit for work, he remained on the company's books and received a P60 for "zero pay" and a £10 Christmas bonus. At the end of 1998 he was asked by the Personnel Manager if he wanted to take redundancy pay or to stay on the books. As he was 59 by then, he elected to stay on the books. Later that year he was declared fit for work, but then discovered that the company was about to go into liquidation and he did not want to go back to work for just three weeks as he might risk damaging his hand again.

When the company went into liquidation, he made a claim for statutory redundancy pay. He was refused on the basis that he had not been working for the company since 1996 as his contract had been frustrated by his injury.

It was held that the contract was frustrated by his injury. Frustration happens by operation of law, and cannot be resisted by an employer keeping a useless employee on the books and paying him nothing.

31.4 ***Hirji Mulji v. Cheong Yue Steamship Co.*** **[1926] AC 497 (HL)**

By a charter party entered into in November 1916, shipowners agreed to place their ship, the Singaporean, at the charterers' disposal on March 17th 1917 for 10 months. The ship was requisitioned before this date, at which time the shipowners asked the charterers if they would be willing to take up the charter when the ship was released. The charterers said they would, but the ship was not released until February 1919, and the charterers refused to accept it. The shipowners claimed that the charterers had affirmed the contract after frustration, and so were bound by it. The House of Lords held that this was not possible.

II: FRUSTRATING EVENTS

The following cases illustrate the kinds of event which may, as a matter of law, lead to the frustration of a contract.

32 DESTRUCTION OF THE SUBJECT MATTER

32.1 If the contract becomes impossible to perform because the subject matter has been destroyed, either partially or entirely, the contract will be discharged.

32.2 ***Taylor v. Caldwell*** **(1863) 3 B&S 826 (above)**

It is notable that the contract was frustrated even though it was only the Music Hall that was destroyed. There was clearly no practical point in having the fetes without having the concerts.

32.3 The subject matter may be regarded as 'destroyed' even if it still exists, provided that the supervening event has completely changed its commercial character.

32.4 ***Asfar v. Blundell*** **[1896] 1 QB 123 (CA)**

A cargo of dates worth £4,690 was sunk in the Thames and contaminated with sewage so that the dates were no longer fit for human consumption. It was held that there had been a total loss of subject matter and the cargo owner was discharged from his liability to pay freight, even though the cargo was still saleable for £2,400 if used for distillation into spirit. The insurers claimed, *inter alia*, that the freight contract was not frustrated as there had not been a total loss of the subject matter.

"The first point taken on behalf of the defendants, the underwriters, is that there has been no total loss of the dates, and therefore no total loss of the freight on them. The ingenuity of the argument might commend itself to a body of chemists, but not to businessmen. We are dealing with dates as a subject-matter of commerce, and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature and they were still dates. There is a perfectly well-known test which has for many years been applied to such cases as the present: That test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business.

"But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss." per Lord Esher MR at p.127

33 SPECIFIC AND NON-SPECIFIC GOODS

33.1 Where the contract involves *specific goods* which have been destroyed, frustration may occur either at common law or under the provisions of the Sale of Goods Act 1979.

33.2 **SALE OF GOODS ACT 1979 s.7**

Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.

33.3 Where the goods in question are 'non-specific', the statute will not apply, and it will be more difficult to establish frustration, even at common-law. The general presumption is that if the buyer does not specify exactly which goods he wants, it is of no concern to him how the seller is going to source them. If the seller cannot then obtain any goods of the contractual description, this will simply amount to a breach of contract.

33.4 ***Blackburn Bobbin Co. Ltd. v. T.W. Allen & Sons Ltd.*** **[1918] 2 KB 467 (CA)**

Early in 1914, timber merchants agreed to sell a quantity of Finland birch timber. The sellers did not keep stocks of the timber as the usual practice was to have it shipped directly from Finland, but this was not known to the buyers. When the war broke out, imports of timber from Finland were stopped by the presence of German warships in the Baltic. The sellers claimed that the contract had been frustrated. The Court of Appeal held that it had not.

"Why should a purchaser of goods, not specific goods, be deemed to concern himself with the way in which the seller is going to fulfil his contract by providing the goods he has agreed to sell? The sellers in this case agreed to deliver the timber free on rail at Hull, and it was no concern of the buyers as to how the sellers intended to get the timber there… Here there is nothing to show that the plaintiffs contemplated, and there is no reason why they should be deemed to have contemplated, that the sellers should continue to have the ordinary facilities for dispatching the timber from Finland. As I have said, that was a matter which, to the plaintiffs, was wholly material. It was not a matter forming the basis of the contract they entered into." per Pickford L.J. at p.469

33.5 ***CTI Group Inc. v. Transclear SA: The Mary Nour*** **[2008] 2 Lloyd's Rep. 526 (CA)**

CTI had a scheme to break the cartel operated by Cemex, a monopoly supplier of cement in Mexico. The plan was to acquire a large quantity of cement and to ship it in a vessel which could be moored off the Mexican coast, and used as a silo to supply the on-land market.

On May 7, CTI contracted to buy the cement from Transclear. On May 14, Transclear said that it could not supply the cement as its suppliers' parent company was 25% owned by Cemex, and would not permit the transaction to proceed.

After several abortive attempts to rescue the scheme, CTI gave up and claimed substantial damages from Transclear.

Transclear claimed that it had not been in breach of the contract, *inter alia*, because the contract was frustrated when it proved impossible to supply the cement.

Following ***Blackburn Bobbin Co. Ltd. v. T.W. Allen & Sons Ltd.*** **[1918**], the Court of Appeal held that the contract had not been frustrated and that Transclear was in breach of contract.

"In my opinion, where a seller makes an unqualified promise to sell, he bears the risk of a failure of his contemplated source of supply where that source is not the specified source or the goods are not specific goods and the supplier is not excused by frustration, e.g., it is physically and legally possible for the supplier to make delivery but he chooses not to. This is because there is always a risk of supplier failure and as between the buyer and the seller, it is the seller who is in a position to guard against the risk either by making a binding and enforceable contract with the supplier with an appropriate jurisdiction or arbitration clause, or, as Lord Denning said in Intertradex SA v Lesieur Tourteaux SARL [1978] 2 Lloyds Rep 509 by protecting himself by making his promise conditional on the goods being available for delivery. This is no more than good sense and common justice. In a commercial age in which wealth is made up largely of promises, it is of the greatest importance that contractual obligations are enforced in accordance with their terms save only in a most limited range of circumstances."
per Moore-Bick L.J. at para 8, citing with approval Field J.'s decision

"In my view it is impossible to hold that the contract in this case was frustrated. As the decided cases show, the fact that a supplier chooses not to make goods available for shipment, thus rendering performance by the seller impossible, is not of itself sufficient to frustrate a contract of this kind. In order to rely on the doctrine of frustration it is necessary for there to have been a supervening event which renders the performance of the seller's obligations impossible or fundamentally different in nature from that which was envisaged when the contract was made. In the present case, however much pressure Cemex put on suppliers, the nature of the performance called for by the contract remained the same. Whether the suppliers chose to succumb to that pressure was a matter of choice. Indeed, if the sellers had entered into a binding contract with PT Semen Padang it would have been impossible for that company to argue that the contract had been frustrated as a result of commercial pressure from Cemex since it would still have had the choice between performing the contract and breaking it. Even if one were to regard the arrangements between the sellers and PT Semen Padang (or subsequently Sumitomo and China Rebar) as tantamount to a contract for these purposes, the operative cause of the failure to ship the goods was still the supplier's decision to succumb to pressure from Cemex. In those circumstances for the reasons given earlier the sellers bore the risk of a refusal on the part of the supplier to make goods available." per Moore-Bick L.J. at para 27

33.6 A case from Singapore demonstrates a perplexing interpretation of these rules. A contract for the supply of concrete was held to have been frustrated when – due to an export ban – the suppliers were unable to source Indonesian sand to make the concrete, even though it was only implied that the concrete would be made from Indonesian sand; and even though, had it been an express term, the sand would not have been specific goods anyway.

33.7 ***Alliance Concrete Singapore Pte Ltd. v. Sato Kogyo Pte Ltd.*** **[2014] SGCA 35 (Court of Appeal of Singapore)**

A contractor was engaged on three construction projects in Singapore. The supplier agreed to supply concrete to the contractor, which it was commonly understood – though not specified in the contract – would be made with sand imported from Indonesia. During the term of the supply contract, the Indonesian government banned exports of concreting sand to Singapore, resulting in far greater costs to the supplier in sourcing sand from elsewhere. The contractor refused to renegotiate the price, and when the Indonesian sand ran out, so did the supply of concrete. The supplier claimed, *inter alia*, that the contract was frustrated.
The judge at first instance rejected this claim: the contracts had not required the concrete to be made from Indonesian sand, and the ban had merely made obtaining the concrete more expensive rather than impossible.

The Court of Appeal of Singapore allowed the appeal by the supplier, holding that the contract had been frustrated by the export ban as it was the common understanding of the parties that the sand would come from Indonesia. Although it had not been expressly specified in the contracts, both parties had contemplated that Indonesian sand would be used in preparing the concrete. Indonesia had been the primary source of concreting sand used in Singapore. The client for one of the projects preferred Indonesian sand to be used. The source of the sand had to be consistent: it affected the design of the mix and whether the mix would be approved for supply. The fact that the source of the sand did not feature during the parties' negotiations and that the supplier did not tell its sand suppliers to supply only Indonesian sand was consistent with the common assumption that the sand would come from Indonesia.

34 TEMPORARY UNAVAILABILITY OF THE SUBJECT MATTER

34.1 A contract may be frustrated if the temporary unavailability of the subject matter turns the contract into a 'different adventure' to that which was contemplated, rather than simply making it less convenient or profitable to perform.

34.2 ***Jackson v. Union Marine Insurance Company Ltd.*** **(1874) LR 10 CP 125 (Court of Exchequer Chamber)**

A ship sailed from Liverpool on January 2 1872 with instructions to proceed "with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo for carriage to San Francisco." The ship ran aground in Carnarvon Bay and was delayed for over a month. The repairs were to take another six months. The charterers claimed that the contract had been frustrated and chartered another ship for their cargo. It was held that the contract was indeed frustrated.

Even though the ship could have completed its voyage after repairs, this would have been a "different adventure" to that originally embarked upon.

"The voyage the parties contemplated had become impossible… A voyage undertaken after the ship was sufficiently repaired would have been a different voyage. Not, indeed, different as to the ports of loading and discharge, but different as a different adventure – a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage while the one after the repair would have been an autumn voyage." per Bramwell B.

35 INCAPACITY OF PERSONNEL

35.1 Whether an enforced absence from work will frustrate an employment contract depends on the nature of the employment and the reasons for and duration of the absence. (If the contract is frustrated, then the employee will not have been 'dismissed', and so cannot have been wrongfully or unlawfully dismissed.) It is up to the employee to prove that a contract has been frustrated

35.2 The essential test of whether an employment contract has been frustrated is to ask whether it is reasonable to expect the employer to keep the job open until the employee returns. If it is obvious that the employee will never return to work, or cannot hope to pick the job up after his or her return (reasonable adjustments aside) then there will normally be no difficulty in establishing that the contract has been frustrated.

35.3 Where it is likely that the employee will be able return eventually, the question becomes more nuanced. This is especially the case if the absence is due to imprisonment, rather than illness. Is an employer bound to retain the services of a convicted criminal?

35.4 Several cases have discussed the criteria that might be considered by a court in answering these questions. Although some deal with illness and others with imprisonment, the basic tests are the same and interchangeable.

35.5 Note that where an employee is absent and it later becomes clear that it is not feasible to hold open the job (for example where a later prognosis suggests that a dancer will never fully regain the use of his legs after an accident), the frustration will be deemed to have occurred at the time of the first absence, rather than at the time of the diagnosis (or prison sentence etc.)

ABSENCE DUE TO ILLNESS

35.6 ***Marshall v. Harland and Wolff Ltd.*** **[1972] 1 WLR 899**

Reuben Marshall was a shipyard fitter who had been employed by Harland and Wolff Ltd. since 1946. From October 3 1969 he was off sick, with angina and before he had the chance to go back to work, his employers closed down the works where he was employed in June 1971. They sent him a letter telling him that his contract had been terminated, and that he would not be receiving any redundancy pay because of his long absence.

The employers had made no previous attempt to terminate his employment, and had not been obliged to pay him whilst he was off sick. The court found, in fact, that had he recovered before the works closed down, the employer would probably have taken him back. The question now was whether he was actually still employed at the time the works closed, or whether his contract had already been terminated by frustration. After giving a classic exposition of the relevant criteria to consider, the court held that the contract had not been frustrated. There was no evidence that Marshall was permanently incapacitated, and there was nothing either in the employee's policy or practice to prevent him from returning to his original job once he had recovered. Thus, nothing had radically altered due to his temporary – albeit lengthy – incapacity.

"In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: "Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?" In considering the answer to this question, the tribunal should take account of:

(a) The terms of the contract, including the provisions as to sickness pay

The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.

(b) How long the employment was likely to last in the absence of sickness

The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job than if it was expected to be long term or even lifelong.

(c) The nature of the employment

Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) The nature of the illness or in jury and how long it has already continued and the prospects of recovery

The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

(e) The period of past employment

A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.

These factors are inter-related and cumulative, but are not necessarily exhaustive of those which have to be taken into account. The question is and remains: "Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment?" Any other factors which bear upon this issue must also be considered."

per Sir John Donaldson at p.903

35.7 ***Egg Stores Ltd. v. Leibovici*** **[1977] ICR 260**

Following an accident, Leibovici was absent from work from November 28 1974. When he asked for his job back in April 1975, he was told that the contract had been frustrated. It was held that the contract was frustrated, considering such matters as:

- The length of the previous employment
- How long that employment was expected to continue
- The nature of the job
- The nature and effect of the illness
- The need for the job to be done by a replacement
- Whether it was reasonable in the circumstances for the employer to wait for the employee to return

"It is possible to divide into two kinds the events relied upon as bringing about the frustration of a short-term periodic contract of employment. There may be an event (e.g. a crippling illness) so dramatic and shattering that everyone concerned will realise immediately that to all intents and purposes the contract must be regarded as at an end. Or there may be an event, such as an illness or accident, the course and outcome of which is uncertain. It may be a long process before one is able to say whether the event is such as to bring about the frustration of the contract.

"But there will have been frustration of the contract, even though at the time of the event the outcome is uncertain, if the time arrives when, looking back, one can say that at some point (even though it is not possible to say precisely when) matters have gone on so long, and the prospects for the future were so poor, that it was no longer practical to regard the contract as still subsisting." per Phillips J. at p.265

35.8 ***Condor v. The Barron Knights Ltd.*** **[1966] 1 WLR 87**

Edward Lottian Condor joined the Baron Knights as a drummer in 1962,aged 16. Due to living in a freezing caravan, not eating properly and working seven nights a week (including some double engagements), he became ill and collapsed during an engagement in Hitchin. His doctor told the manager of the group that it was inhumane for a lad of sixteen to be working so hard and living in such conditions, and said that he should not perform more than a few nights a week. The group had engagements for seven nights a week and so terminated the contract with Condor. Condor sued for breach of his contract of employment, but it was held that his contract had been frustrated.

35.9 ***Hogan v. Cambridgeshire County Council*** **[2001] WL 825573 (EAT)**

Mrs. Hogan worked as a Senior Legal Executive for the legal department of Cambridgeshire CC. She was certified sick between November 14 1994 and May 9 1995. On August 2 1995 she was suspended pending a disciplinary hearing which was scheduled for October 13 1995.On October 4 1995 she was certified sick due to depression and was never certified as fit to return to work again.

On April 25 1996 she successfully applied to Cambridgeshire CC for a grant to pursue a full-time three-year degree course at Huntingdon Regional College to begin on September 26 1996.

On February 4 1997 she received a letter from the Director of Human Resources pointing out that as she had been off sick since October 4 1995 and was now on a full-time course until July 1999, her employment contract had been discharged by frustration. Hogan sued for unfair dismissal.

It was held that the contract had been frustrated. In particular, the court observed that although frustration is independent of the volition or intention of the parties, the behaviour of the parties might be relevant in judging whether the changed circumstances went to the root of the contractual relationship. It was therefore relevant that Hogan herself had not expected to be returning to work for some time as she had embarked on the degree course.[18]

SUPERVENING DISABILITY

35.10 If an employee becomes unable to do his job through a supervening disability, the doctrine of frustration will not apply unless and until the employer has first complied with the duty to make reasonable adjustments in accordance with the Equality Act 2010 s.20 and shown that performance of the contract of employment was impossible.

35.11 ***Warner v. Armfield Retail and Leisure Ltd.*** **[2014] ICR 239 (UKEAT)**

Alan Warner was a site manager for ARL, a small business engaged in the refurbishment of shops and pubs. He had a severe stroke in February 2010 which left him unable to work. His employers paid him discretionary sick pay for four months. In September 2010, Warner moved from Berkshire (where his employers were based) to Dorset, and lost contact with his employers. In January 2011, he was sent his P45, and claimed unfair dismissal and disability discrimination. The employers claimed that the contract had been frustrated.
Warner argued that the doctrine of frustration could not arise in relation to someone who had become disabled under the meaning of the Equality Act 2010, as this gave rise to a statutory duty to make reasonable adjustments, and as those adjustments might render the contractual obligations 'radically different', the very duty to make reasonable adjustments was incompatible with the doctrine of frustration.

The EAT did not agree. Although an employer might be required to make reasonable adjustments where possible to accommodate a disabled employee, if there were no such adjustments that could reasonably be made, the doctrine of frustration could still apply. However, the EAT remitted the issue of whether the employers had actually carried out any form of capability procedure (i.e. the discrimination question) to be decided at another hearing as this had not been dealt with by the original tribunal.

"In the end, therefore, we have come to the conclusion that Mr Adjei's submission (for the employers) is correct. In the case of a disabled person, before the doctrine of frustration can apply there is an additional factor which the tribunal must consider over and above the factors already identified in the authorities—namely whether the employer is in breach of a duty to make reasonable adjustments. While there is something which (applying the provisions of the Equality Act 2010 it is reasonable to expect the employer to have to do in order to keep the employee in employment the doctrine of frustration can have no application. This submission derives support from Thorold v. Martell Press Ltd 8 March 2002, and we think it is correct.

"In this case the tribunal considered whether the employers were in breach of the duty to make reasonable adjustments and found that they were not. It applied the correct test, and its conclusion therefore cannot be impugned." per Judge David Richardson at paras 46 and 47

[18] See also ***Hart v. Marshall & Sons*** **[1977] 1 WLR 1067;** and ***Collins v. SS for Trade and Industry*** **[2001] WL 75333 (EAT)**

IMPRISONMENT

35.12 A person who has been imprisoned for committing a crime may wish to claim either that the contract *was* frustrated (so he would not be in breach of contract for not attending); or that it was *not* frustrated (so that his employer would be liable for wrongful or unfair dismissal). The courts have tended to find against the convict in either case!

35.13 ***Harrington v. Kent County Council*** **[1980] IRLR 353**

Harrington was a teacher who was sentenced to prison for twelve months. It was held that this frustrated his contract. Where an employee has been imprisoned for a criminal offence, the employer may be able to treat the employment contract as frustrated and so defeat a claim of unfair dismissal. Whether the imprisonment does frustrate the contract may depend on the length of sentence and the nature of the employment.

35.14 ***Sumnall v. Statt*** **(1984) 49 P&CR 367**

A tenant was required to "reside constantly" at a farmhouse. His residence was interrupted when he was sent to prison. He claimed that the contract had been frustrated, but it was held that it had not, and he had no legal excuse for breaching the contract.

35.15 ***F.C. Shepherd & Co. Ltd. v. Jerrom*** **[1987] QB 301 (CA)**

In September 1979, Mark Jerrom was apprenticed as a plumber to F.C. Shepherd & Co. Ltd. on a four-year contract. In June 1981, following a 'punch-up' in which a youth was killed, he was sentenced to Borstal for 39 weeks for conspiracy to commit assault and affray. The employers stated that they were not prepared to take him back after he was released. In March 1982, Jerrom claimed to have been unfairly dismissed. The industrial tribunal dismissed the employers' claim that the contract had been frustrated, and awarded Jerrom the maximum compensation for unfair dismissal.

The decision and award were upheld by the Employment Appeal Tribunal. However, the Court of Appeal was less charitable towards the roguish apprentice. They held that the contract **had** been frustrated by the custodial sentence.

"(In my judgment) the sentence of Borstal training did frustrate the contract… The parties must have contemplated that four years' training was necessary for producing a qualified plumber. The passing of the sentence meant that there was going to be a substantial break in the period of training, probably 39 weeks, possibly six months, but also possibly more than 39 weeks. At the end of the contract period the apprentice was not going to be as well trained as the parties had contemplated he would be."

per Lawton L.J. at p.320

35.16 ***Burns v. Santander UK plc*** **[2011] IRLR 639**

Although this was not a frustration case, it illustrates the exercise of a similar policy. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal that the claimant, who had been remanded in custody charged with 13 criminal offences, including a physical assault on a prostitute in a car and sexual assault on a girl, was not entitled to be paid during his absence. Although he was ready and willing to work, he was unable to do so because he was in prison. The tribunal found that his inability to work was avoidable. As a result of being charged with criminal offences and being remanded into custody, he had disabled himself from attending work, his consideration for the payment of wages under the contract (which continued until his later dismissal). Even though his contract had not been frustrated, there was no unlawful deduction.

CONTINUED EMPLOYMENT BECOMING IMPOSSIBLE

35.17 An employment contract will be frustrated if the position requires the employee to have a particular quality (such as being a member of the Board of Directors or a full-time student) which he has when he takes the job, but subsequently loses.

35.18 ***Anyanwu v. South Bank Student Union*** **[2003] Times December 5 (EAT**)

Mr. Anyanwu was a student of South Bank University who graduated with a degree in engineering in 1995. Mr. Ebuzoeme graduated in politics in 1995, but stayed on at the university on the part-time CPE course. In the spring of 1995, both men were elected as Sabbatical Officers for the Students' Union and issued with employment contracts for a fixed term from August 1 1995 to July 31 1996. Following a series of acrimonious confrontations with Martyn McCormack, the General Manager of the Union, Ebuzoeme was suspended from the university for allegedly assaulting members of staff (and the attending police officer). Anyanwu was then also suspended, for alleged misappropriation of union funds.

On March 21 1996, the university altered the SU Constitution (which it was entitled to do) and imposed an interim Constitution on the SU pending the approval of a new Constitution. The interim Constitution provided that: "The officers of the student union in post at the beginning of the interim period are hereby removed from office," and thus Messrs Anyanwu and Ebuzoeme were removed from their posts.

On March 28 1996, disciplinary hearings were held regarding the suspensions for misconduct. Neither man attended and they were both expelled from the University. As the SU Constitution requires that only full members of the Union shall be eligible to stand for election to Sabbatical posts, neither man could now stand for re-election, and so it was clearly impossible for them to continue with their fixed term contracts which relied on their being the duly elected Sabbatical Officers. It was held that these contracts were thus frustrated.

35.19 However, the courts will not readily find that a contract has been frustrated just because the employee cannot attend work as usual.

Gryf-Lowczowski v. Hinchingbrooke Healthcare NHS Trust **[2005] EWHC 2407**

Jan Gryf-Lowczowski was the lead surgeon on the colorectal unit of the defendant's hospital. Following concerns about G-L's clinical practice an investigation was undertaken by the National Clinical Assessment Authority, which made various recommendations for a modified practice by G-L. In the meantime, he had not performed surgery for over ten months and so was required to undertake 'clinical re-entry training', which involved finding another NHS Trust willing and able to undertake the reskilling of G-L.

Unfortunately, no such Trust could be found, and two years later the defendant claimed that G-L's contract had been discharged by frustration. The court did not agree. Even two years after the initial suspension, there was still a realistic chance of finding a Trust willing to undertake the reskilling of G-L, and thus to enable him to continue his duties under his contract. The contract could not yet be said to have become incapable of performance, and so could not be found to have been frustrated.

35.20 ***Four Seasons Healthcare Ltd. v. Maughan*** **[2005] IRLR 324 (EAT)**

Mr. Maughan was employed as a Registered Mental Nurse at a care home operated by Four Seasons Healthcare Ltd. In January 2003 he was suspended from duty as a result of an allegation of abuse of a patient. The police were notified, and Maughan was subsequently charged with several serious offences. He was granted bail on two conditions:

(i) he should not communicate with the prosecution witnesses (including other employees of the care home; and

(ii) he must not enter the premises of the home.

Following an enquiry from Maughan's union in May 2003, FSH said that he would continue to be suspended until after a full investigation had been carried out, which could not take place until after the prosecution. In November 2003 he was sentenced to two years imprisonment.

Maughan had not been paid during his suspension and claimed his arrears of wages for that time. FSH said that his contract had been frustrated from the time when his bail conditions would not permit to attend work.

It was held that his contract had **not** been frustrated, and that he was entitled to £15,145.44.

The case was distinguished from ***F.C. Shepherd & Co. Ltd. v. Jerrom*** as the employee here was not actually in custody, and so could have been employed elsewhere by FSH.

Furthermore, FSH had not previously attempted to dismiss him or to have his contract declared as frustrated, but had simply kept him suspended, indicating that they themselves did not consider the situation to warrant such serious consequences.

36 SUPERVENING ILLEGALITY

36.1 If the contract becomes illegal to perform after it is made, it will be discharged. This has usually been because of war-time restrictions.

36.2 It is not necessary for the entire contract to become illegal, as long as its fundamental purpose has been radically altered.[19]

36.3 ***Denny, Mott & Dickson v. James B. Fraser & Co. Ltd. [*1944] AC 265 (HL Scotland)**

Under an agreement of 1929 between two timber merchants, the respondents agreed to purchase all supplies of a certain type of timber from the appellants, and to lease them a timber-yard with an option to purchase. When it became illegal to trade in timber under war-time regulations, the appellants continued to occupy the timber-yard, and claimed to exercise the option to purchase. It was held that the whole agreement, including the lease and the option to purchase, had become frustrated by the Control of Timber Order 1939.

The appellants argued that the emergency legislation did not frustrate the contract because it still permitted the option to purchase to proceed, but the House of Lords rejected this. They unanimously held that the option to purchase was subsidiary to the main purpose of trading in timber.

"What is the substantial contract and is that frustrated? Looking at this contract and to the frustrating event, I think it would be unreasonable not to regard the trading agreement as the substantial matter, so that when that is frustrated so is the contract as a whole. It would not be possible, in my opinion, to regard the whole contract as surviving when the trading agreement became frustrated."

per Lord Macmillan at p.280

36.4 On the other hand, if, despite the subsequent illegality of part of a contract, the contract retains its original character, it will not be frustrated. The illegal part will effectively be blue-pencilled.

36.5 ***Islamic Republic of Iran Shipping Lines v. Steamship Mutual Underwriting Association (Bermuda) Limited [*2011] Lloyd's Rep. I.R. 14**

In order for a ship over 1,000 GT to trade in the territorial waters of States which are parties to the International Convention on Civil Liability for Bunker Oil Pollution Damages 2001, the owners must take out insurance to meet their potential liabilities under the Convention. When ships have such cover, the insurance company, known as a 'P & I Club', (*Protection and Indemnity Club*) issues a 'Blue Card' to the State Maritime and Coastguard Agency, who in turn issue a certificate to the insured ship to permit it to enter the territorial waters in question. China and the UK are both parties to the Convention. Iran is not.

[19] This is a very rare example of a lease being frustrated.

In 2009, the IRISL took out such insurance on twenty-eight ships owned by it, to last from February 20 2009 until February 20 2010. The insurance cover went beyond that required by the Convention.

On October 30 2009, the Club terminated the cover in respect of all ships owned by IRISL, on the grounds that the contract of insurance had been frustrated by the Financial Restrictions (Iran) Order 2009 which prohibits transactions and business relationships between persons operating in the financial sector and the IRISL, subject to the provision that HM Treasury is entitled to issue exemption licences for specific contracts. HM Treasury had issued such a licence to the Club in respect of providing insurance to IRISL until October 30 2009. (The Order was made pursuant to the powers in the Counter-Terrorism Act 2008.) However, on the same day, HM Treasury issued a further licence to permit the Club to continue a business relationship with IRISL to the extent that this was necessary to handle existing claims, and to provide insurance cover under existing Blue Cards for a period of three months. (i.e., Only to supply the cover required by the Convention.)

On October 31 2009 (i.e., one day later) one of the ships – the ZOORIK – suffered a casualty in Chinese waters causing extensive bunker oil pollution. The Club refused to satisfy the claim made by the Chinese authorities against IRISL, claiming that the insurance contract had been frustrated by supervening illegality on October 30, and that the new licence did not remedy this as it permitted only a narrow version of the original cover.

Taking a holistic approach, in accordance with the dicta of Rix L.J. in The Sea Angel, and distinguishing Denny-Mott, Beatson J. held that the contract had not been frustrated on October 30, because the licence issued that same day ensured the continuation of its central purpose of providing indemnity insurance for oil pollution, which – although narrower than originally contemplated – was essentially of the same character.

37 FRUSTRATION OF PURPOSE

37.1 It may become totally impractical to pursue a contract, even though, technically, it is still possible. This will frustrate the contract, provided there was no other purpose to the contract which is still extant.

37.2 The two cases on this issue are known as the “Coronation Cases” as they both concerned the cancelled coronation of King Edward VII. Edward was the eldest son of Queen Victoria, the second-longest reigning British monarch, and ascended the throne on January 22, 1901 upon Victoria's death. The coronation was originally scheduled for June 26, 1902, but Edward had to undergo an emergency appendectomy operation, so the coronation was postponed until August 9, 1902.

Unfortunately, several people had made contractual arrangements involving seeing the associated celebrations which were based on the original coronation time and date. Although they could still in practice perform the contracts by being in the right places at the allotted time, there was clearly no point in being there if there were going to no parade to witness.

In two cases decided by the same court a few days apart, Vaughan Williams LJ discussed the situations in which a contract could be frustrated because there was no purpose left to it.

i) There must be no commercial purpose at all left to the contract. Thus, if a contract has more than one purpose to it, the defeat of only one purpose will not frustrate the contract.

ii) Both parties must have objectively realised when the contract was made that its function fundamentally depended on the event that has now been frustrated.

iii) It must be the case that either party/ both parties could have refused to perform the contract following the frustrating event. Vaughan-Williams LJ used the analogy of a taxi-driver who is hired to take a client to a particular place (e.g., the Epsom race-track) on a particular day (e.g., the day of the Epsom Derby.) The cancellation of the Derby would not entitle the client to refuse to take and pay for the taxi contract unless it could be said that the taxi-driver could equally refuse to take the client to Epsom, even if the client still wanted to go. This would be very unusual.

37.3 ***Herne Bay Steamboat Co. v. Hutton*** **[1903] 2 KB 683 (CA)**

The defendant (Hutton) hired a steamship, Cynthia, which he planned to use to take passengers from Herne Bay to see the coronation naval review conducted by the King at Spithead and to cruise round the fleet. When the review was cancelled due to the King's illness, Hutton claimed that the whole contract had been frustrated, as he could no longer sell the cruises on the basis of the review. The court held that the contract was NOT frustrated. Seeing the King's review was only a part of the purpose of the contract. As the fleet was still anchored at Spithead, Hutton could still viably conduct cruises around it.

Vaughan Williams L.J. began to formulate his famous 'cab to Epsom' analogy, which he completed in another case! (Krell v. Henry):

"Mr. Hutton, in hiring this vessel, had two objects in view: first, of taking people to see the naval review, and, secondly, of taking them round the fleet. Those, no doubt, were the purposes of Mr. Hutton, but it does not seem to me that because, as it is said, those purposes became impossible, it would be a very legitimate inference that the happening of the naval review was contemplated by both parties as the basis and foundation of this contract, so as to bring the case within the doctrine of Taylor v. Caldwell.

"On the contrary, when the contract is properly regarded, I think the purpose of Mr. Hutton, whether of seeing the naval review or of going round the fleet with a party of paying guests, does not lay the foundation of the contract within the authorities.

"Having expressed that view, I do not think that there is any advantage to be gained by going on in any way to define what are the circumstances which might or might not constitute the happening of a particular contingency as the foundation of a contract. I will content myself with saying this, that I see nothing that makes this contract differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain. So in the present case it is sufficient to say that the happening of the naval review was not the foundation of the contract." per Vaughan Williams L.J. at p.689

37.4 ***Krell v. Henry*** **[1903] 2 KB 740 (CA)**

C.S. Henry agreed to hire a room in Pall Mall from Paul Krell from which to observe the coronation procession of Edward VII. When the procession was cancelled, the contract was held to be frustrated, even though technically the defendant could still have occupied the room for the day, and even though the contract contained no express reference to the coronation procession, or to any other purpose for which the flat was taken.

"English law applies the principle (of frustration) not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance…

"I do not think that the principle… is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substances of the contract, and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such a case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited." per Vaughan Williams L.J. at p.748/749

Vaughan Williams L.J. however, speculated *obiter* on similar catastrophes which would NOT have led to the frustration of a contract. In particular, he milked his 'cab to Epsom' analogy a bit more.

"No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high, but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said: "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day.

"Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the day named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract." per Vaughan Williams L.J. at p.750

38 METHOD OF PERFORMANCE BECOMING IMPOSSIBLE

38.1 A contract will usually be discharged if it provides for a specific and exclusive method of performance which becomes impossible.

38.2 ***Nicholl & Knight v. Ashton Edridge & Co.*** **[1901] 2 KB 126 (CA)**

A contract was made for the sale of cottonseed "to be shipped per steamship Orlando from Alexandria during January." The Orlando ran aground in the Baltic so that she could not get to Alexandria in January. It was held that the contract was frustrated as it provided for performance only in the stipulated manner.

38.3 If a stipulated method of performance becomes impossible, but is not regarded as exclusive, there may be an obligation to perform the contract in a different way, even if this would be much more expensive than contemplated. This would depend on whether the alternative method of performance differed fundamentally from that originally undertaken.

38.4 The issue arose particularly in the so-called Suez Cases which arose out of the closure of the Suez Canal in 1956 and in 1967.

THE SUEZ CASES

38.5 ***Ocean Tramp Tankers Corp v. VO Soyfracht: The Eugenia [1964] 2*** **QB 226 (CA)**

The Eugenia was let to the charterers for a "trip out to India via Black Sea" with the express provision that the ship should not be taken into a "dangerous" zone where there were any hostilities or threatened hostilities. When the charterparty was negotiated, the agents of both parties realised that the Suez Canal might be closed, but no express terms were inserted in the charter to meet that eventuality. When the ship arrived at Port Said, Egyptian government and the vessel was trapped.

The owners claimed that the charterers were in breach of contract to have taken the ship into a dangerous zone, but the charterers claimed that the contract had been frustrated by the closure of the canal.

HELD: The charterers were in breach of contract and the closure of the canal did not bring about so fundamentally different a situation as to frustrate the venture.

38.6 ***Tsakiroglou & Co. Ltd. v. Nobles Thorl GmbH* [1962] AC 93 (HL)**

A contract was made for the sale of Sudanese groundnuts at an inclusive price to cover the cost of the goods, insurance and carriage to Hamburg. When the contract was made, both parties expected that shipment would be via Suez, although this was not expressly provided in the contract. On the closure of the canal, the seller could have shipped the goods via the Cape of Good Hope, although this would have taken two and a half times as long and have doubled the cost of carriage.

It was held that the contract was NOT frustrated, as the difference between the two methods of performance was not fundamental.[20]

38.7 ***Globe Master Management v. Boulus-Gad: The Serenade* [2002] EWCA Civ 313 (CA)**

The defendants chartered the ship "Serenade" from the claimants to give pleasure trips for Israeli citizens. The idea was that the ship would ply the Eastern Mediterranean and the Red Sea outside Israeli territorial waters, so the passengers could gamble and buy duty free goods, free from statutory restrictions. It was marketed as "Las Vegas on the Water". The ship was chartered on March 7th 2000 and the cruising started on March 25th.

However, in September 2000, the al-Aqsa intifada (an uprising by the Palestinian Arabs against Israel) began, and developed into the worst period of violence in Israel's history, excepting only the periods of all-out war with neighbouring Arab countries.

Following many cancellations, the charterers decided that the charter must come to an end and wrote to the claimants on October 27th: *"As you are aware, due to the warlike hostilities and the dangerous security complications in the area, we decided to stop our cruise operations this season as from October 31st 2000, and we will resume our operations as soon as hostilities cease. Please arrange to evacuate all your staff, equipment and stock from the vessel by the above date."*

On November 1st the vessel was redelivered back to the shipowners. The crewing agency sued for breach of contract, and were met, *inter alia*, with the defence that the contract had been frustrated by the activities of the terrorists. The Court of Appeal held that the contract had not been frustrated as the situation that had developed was neither unexpected nor radically different, particularly since insurance was still available for the venture. Furthermore, the charterers had not originally sought to escape the contract but merely to renegotiate it.

"The deterioration in the security situation in the Eastern Mediterranean was not a surprising, let alone a radically different, event. Although war risk underwriters gave notice of cancellation and required an additional premium for part of that area, there was no indication that underwriters would decline cover for shipping in the area entirely. There was no evidence of any exclusion zone for shipping. The terrorist threat was directed against the Israelis and there was nothing in the crewing management arrangement to suggest that the crewing arrangements were to be for an exclusively Israeli clientele."

per Longmore L.J. at para 20

39 COMMERCIALLY IMPRACTICALITY

39.1 The fact that a contract has become more expensive or onerous to perform will not, in itself, lead to frustration: see ***Davis Contractors Ltd. v. Fareham Urban District Council* (1956)** and the **Suez Cases** above.

39.2 ***Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd.: The Sea Angel* [2007] 2 Lloyd's Rep. 517 (CA)**

On July 27th 2003, the tanker, the 'Tasman Spirit', laden with 67,537 mt of light crude oil, grounded in Karachi and broke in two. Tsavliris entered into a Lloyd's Standard Form of Salvage Agreement with the owners, and under its obligations under this agreement, Tsavliris engaged a number of sub-contracted craft to off-load the remaining cargo. *Inter alia*, this involved chartering a shuttle tanker called 'The Sea

[20] Even in cases where Suez was expressly specified as the route, the contracts were not held to be frustrated. e.g. ***The Captain George K* [1970] 2 Lloyd's Rep 21**

Angel' (owned by Edwinton) to transfer the cargo from the Tasman Spirit onto a larger tanked called 'Endeavour II'. The Sea Angel was chartered from August 25th 2004 for 'up to 20 days', within which time it was to be returned to the owners at Fujairah.

Unfortunately, although the cargo was transferred by September 5th, Tsavliris could not return it to the owners until January 1st 2004 because it was detained in Karachi by the Karachi Port Trust between September 10th and December 26th. (The KPT refused to issue a required 'No Demand Certificate' because they wanted to use the vessel as security for its pollution claims against the owners of the casualty and the Protection and Indemnity Club.) Although this was an unusual step, it was not unknown for Port Authorities to do this. Edwinton charged Tsavliris for the additional charter time, to the sum of US$1,373,320. Tsavliris claimed that the contract had been frustrated by the unexpected delay.

HELD: There was no frustrating event here. The contract has merely become more onerous through a predictable, if unlikely, occurrence.

In the High Court, Gross J. made the following observations: *"It follows, in my judgment, that nothing in the nature of the detention in the present case leads me to treat it as other than an incident of the salvage operations in which Tsavliris was engaged. Viewed in this light, the risk of unreasonable detention of the vessel at the hands of the KPT must be regarded as, objectively, forming part of the matrix of the charterparty. That the risk may only manifest itself on occasions or rare occasions is neither here nor there. If right so far, it would not be straightforward for either party to found a case of frustration on such detention. In any event and whatever might have been the position had it been the Claimants who were asserting frustration, given the evidence summarised above, it is difficult for Tsavliris to do so, it having entered into the charterparty against the background and with the knowledge of the risk I have adumbrated.*

"When considering whether the detention in the present case gave rise to a fundamental or radical change in the obligation originally undertaken, this conclusion as to the contractual setting by itself provides a powerful argument for saying that it did not; the risk was always present. There is indeed a cogent case for concluding that the detention (at least so far as its nature is concerned) came within the ambit of the commercial risks undertaken by the parties." per Gross J. at para 96

The Court of Appeal agreed with him that the risk in question was foreseeable, though emphasising that this was not in itself preclusive of frustration: *"In my judgment, the submissions under this heading became over-refined. In a sense, most events are to a greater or lesser degree foreseeable. That does not mean that they cannot lead to frustration. Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration: as occurs when an event such as a strike, or a restraint of princes, lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for. However, as Treitel shows through his analysis of the cases, and as Chitty summarises, the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead on to frustration.*

"In the present case it was both highly relevant that the unreasonable detention of a vessel participating in salvage services, whether owned or contracted in by the salvors, could be foreseen and was actually provided for in SCOPIC, and also relevant, if it be the case, that the actual circumstances of the detention were comparatively unusual or even unprecedented and lasted for a long time. All such circumstances would need to be taken into account. In Mr Hall's experience the particular circumstances of this detention were then unprecedented but now needed to be taken into account; but in Mr Constantinides's experience, they "definitely" fell at the time within the industry risk. It seems to me that, for the reasons discussed above (at paras 63 to 65), the judge's treatment of this issue was fair. Once a port authority acts unreasonably, the precise circumstances and consequences must essentially be variants on a theme. The foreseeability of this general risk, recognised within the industry, and provided for in its well-known terms of trade (SCOPIC), provides a special and highly relevant factor against which the issue of frustration needs to be assessed. However, like most factors in most cases, it must not be exaggerated into something critical, excluding, preclusive: for if, on the special facts of a particular case, the charter is frustrated, then the obligation to reward the salvor under SCOPIC goes - despite his inability to demobilise his equipment." per Rix L.J. at paras 127 and 128

Rix L.J. also emphasised the need to reach a just commercial result in these cases:

"I have referred to this factor above. It is not an additional test, but it is a relevant factor which underlies all and provides the ultimate rationale of the doctrine. If one uses this factor as a reality check, its answer should conform with a proper assessment of the issue of frustration. If it does not appear to do so, it is probably a good indication of the need to think again. The question in this case is whether it would be just to relieve Tsavliris of the consequences of their bargain, or unjust to maintain the bargain, in a situation where they have assumed the general risk of delay, and have done so in a specific context where the risk of unreasonable detention is foreseeable and has at least in general been actually foreseen, as demonstrated by SCOPIC which, subject to the limits of frustration, protects the salvor from the financial consequences of the delay; where from the very beginning a solution was considered to be possible rather than impossible or hopeless, but only after a period of some three months, and where that solution, although not entirely or even mainly in Tsavliris's own control, was achievable with the cooperation of the owners of the casualty and their Club, known to be in principle available, and the assistance of legal action in the local courts; and where the outcome has confirmed the calculations of the objectively reasonable participants in the events.

"In my judgment the judge's conclusion, that the charter had not been frustrated by 13 or 17 October, shows the doctrine working justly, reasonably and fairly." per Rix L,J. at paras 132 and 133

39.3 ***Gold Group Properties Ltd. v. BDW Trading Ltd. (formerly Barratt Homes Ltd.)*** **[2010] EWHC 323 (TCC)**

Gold owned a plot of development land in Surrey and contracted with Barratt Homes for them to build a large number of houses and flats, with Barratt's payment being a share of the revenue on the sale of the leases. The market value of such houses plummeted before Barratt had started the building works, and they refused to do the work on the basis – *inter alia* - that the contract had been frustrated by the change in the economic situation.

The court held that the contract was not frustrated. Apart from the fact that the drop in the property market was clearly foreseen by the parties, and that there had not really been a frustrating 'event', the court found that there was no injustice to be rectified by allowing the contract to continue in a less favourable economic climate, especially as the parties could easily have renegotiated it. The financial forecast had not rendered the performance of the contract a radically different thing from what was contemplated: it was just more onerous.

"In my judgment, there was in truth no supervening event at all. This is not a case where the subject matter of the contract exploded or was lost, or some other event occurred which could not possibly have been envisaged by the contract, and which deprived both sides of the benefits of the contract. Here, all that had happened was that Barratt had been warned that the minimum prices might not be achieved in the future. Since there was a period of two years minimum between the commencement of the building works on site and the sale of the completed properties, it cannot be reasonably argued that the receipt of a gloomy forecast two years before the properties came onto the market was "an event" in the proper sense of the word. It was clearly something which entitled Barratt to attempt to renegotiate the Schedule of Minimum Prices but, given the time period involved and the volatility of the housing market, the pessimistic forecast received in October 2008 was simply that: a warning of what might happen in the future. It was not the happening of an event which could in principle give rise to the frustration of this agreement." per Coulson J. at para 81

III: LIMITATIONS ON THE DOCTRINE OF FRUSTRATION

By definition, a frustrating event must be "an unforeseen event which is the fault of neither party". The courts have adopted rather wide meanings of both 'unforeseen' and 'fault' in this context.

40 AN UNFORESEEN EVENT

40.1 If the event which is being relied upon to frustrate the contract has been anticipated and provided for by the contract itself, it cannot usually have the effect of frustrating the contract as it is not 'unforeseen'.

40.2 ***Joseph Constantine SS Line Ltd. v. Imperial Smelting Corp. Ltd.*** **[1942] AC 154 (HL*)***

"There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance, notwithstanding that the supervening event may occur." per Viscount Simon L.C. at p.163

40.3 ***Gold Group Properties Ltd. v. BDW Trading Ltd. (formerly Barratt Homes Ltd.)*** **[2010] EWHC 323 (TCC)**

"It is, in my judgment, quite impossible to argue that the contract was frustrated in circumstances where the allegedly frustrating event was both foreseen by and dealt with expressly by the terms of the contract between the parties. Despite the forecast fall in property prices, the Agreement in this case was, and remained, capable of performance." per Coulson J. at para 78

40.4 In ***Jackson v. Union Marine Insurance Company*** **(1874),** the court construed a term which appeared to cover the eventuality as not being intended to have that effect.

40.5 Also in ***Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd: The Sea Angel*** **[2007]** 2 Lloyd's Rep. 517 (CA), Rix L.J. emphasised that foreseeability of an event did not always preclude frustration (para 127 quoted above.)

40.6 This is one of the key reasons for inserting a 'force majeure' clause into a contract as an attempt to 'foresee' even the unforeseeable and thus to avoid the unwelcome possibility of frustration. An example of such a clause in a charterparty may be seen in:

Bunge SA v. Kyla Shipping Co. Ltd.: The Kyla **[2013] 1 Lloyd's Rep. 565**

"The Act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation and errors of Navigation throughout this charterparty, always mutually accepted."

40.7 Even if the event is not provided for in the contract, the fact that it is or should have been foreseen might be enough in itself to prevent the contract being frustrated when it happens.

40.8 ***Armchair Answercall Ltd. v. People in Mind Ltd.*** **[2016] EWCA Civ 1039**

Kendlebell Ltd. ran a franchise business offering telephone answering services. It had 10 franchisees who, between them, had about 1,800 customers.

Kendlebell – being in financial difficulty – made a contract with a competitor company – AA Ltd. – by which AA would take over the management of the business under a new method, centralised at AA's headquarters in Andover. This new method would deprive the current franchise holders of their control of invoicing and payment, and remove from them their call handling function.

The franchisees refused to accept this new method, claimed that there had been a repudiatory breach of contract, terminated their agreements and set up their own company. AA claimed that this 'event' led to the frustration of its contract with Kendlebell as it stripped the contract of its entire commercial purpose.

It was held that there was no frustration, as the reaction of the franchisees was not an unforeseeable event in the circumstances.

40.9 The judgments on this issue are inconsistent. Lord Denning was of the opinion that frustration could only be prevented in these cases if the foreseen event was actually provided for in the contract, but his *obiter* on this matter has not been followed.

40.10 ***Ocean Tramp Tankers Corporation v. VO Soyfracht: The Eugenia*** **[1964] 2 QB 226 (CA)**

"It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated", as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract. The only relevance of its being 'unforeseen' is this: If the parties did not foresee anything of the kind happening, you can readily infer they have made no provision for it, whereas if they did foresee it, you would expect them to make provision for it." per Lord Denning M.R. at p.239

INTERFERENCE BY THE CROWN OR A LOCAL AUTHORITY

40.11 In cases involving compulsory purchases etcetera, the courts have held that since government intervention in land rights is foreseeable, such interference cannot frustrate a contract.

4012 ***Walton Harvey Ltd. v. Walker & Homfrays Ltd.*** **[1931] 1 Ch 274**

The plaintiffs hired advertising space in the defendant's hotel for seven years. During that period, the building was compulsorily acquired by the local authority and demolished. It was held that the contract was not frustrated, as the defendants knew that there was a risk of compulsory acquisition.

40.13 ***Amalgamated Investment & Property Co. Ltd. v. John Walker & Sons Ltd.*** **[1977] 1 WLR 164 (CA)**

A building was entered in the statutory list of buildings of special historical interest a few days after the date of a contract for its sale. The listing had the effect of dramatically reducing its market value. The Court of Appeal held that the risk of a building being listed was one that every owner and purchaser must recognise that he is subject to, with the result that the contract was not frustrated.

40.14 ***E. Johnson & Co. (Barbados) Ltd. v. N.S.R. Ltd.*** **[1997] AC 400 (Privy Council: Barbados)**

On July 5th 1989, the vendors agreed to sell land to the purchasers, with a completion date of September 30th 1989. On September 7th, the Crown issued a notice of intended compulsory purchase. The purchasers submitted, *inter alia*, that the notice of September 7th frustrated the contract of purchase. The Privy Council held that it did not: *"On the conclusion of a contract for sale of land, the risk passes to the purchaser. It will be presumed, in the absence of specific provision to the contrary, that the purchaser has agreed to accept the normal risks incidental to land ownership. The risk of interference with land-owning rights by the Crown or statutory authorities is always present."* per Lord Jauncey at p.406

THE EFFECT OF WAR

40.15 In cases involving military intervention, the courts have tended to hold that the outbreak of war will frustrate a contract, even when the war was foreseeable when the contract was made.

40.16 ***Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*** **[1918] AC 260 (HL)**

A contract made with a German company was held to be frustrated by the outbreak of war, even though the outbreak of war was foreseeable when the contract was made.

40.17 However, in the Suez cases, the shipping contracts were held NOT to be frustrated by the hostilities as they had simply become more onerous to perform, rather than impossible.

41 THE FAULT OF NEITHER PARTY: SELF-INDUCEMENT

41.1 The frustrating event must not have been the fault of either party. However, 'fault' in this sense might simply be a matter of causation, rather than blame.

41.2 ***Bank Line Ltd. v. Arthur Capel & Co*** **[1919] AC 435 (HL)**

A 12 month charter which was to run from April 1915 to April 1916 was disturbed when the ship was requisitioned by the Admiralty before delivery. Kt was returned in September 1915, but the House of Lords held that the contract was frustrated since a September to September charterparty was substantially different from that which had been agreed.

It had been suggested that the contract should not be frustrated as the shipowners were given a choice as to which of three ships they would give up to the Admiralty, and so by picking this one they had themselves caused the impossibility of the contract in question. This line or argument was not pursued, but the general principle of self-inducement was dealt with in an *obiter* by Lord Sumner.

"I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration. Indeed, such conduct might give the other party the option to treat the contract as repudiated."

per Lord Sumner at 452

41.3 ***Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*** **[1935] AC 524 (PC Nova Scotia)**

A fishing company hired five trawlers to use for fishing. They intended to use 'otter trawls' for which they required a licence, but the Minister would only grant them three such licences, and asked them to elect the three trawlers to which these licences would be granted. The company picked three, and then claimed that the contract of hire for one of the others (the St. Cuthbert) was frustrated because the charter on it was impossible to perform.

It was held that as they had selected themselves which of the trawlers would remain unlicensed, they had self-induced the problem. Thus the contract was not frustrated, and they had to pay for all the trawlers, including the ones they could not use.

"The essence of frustration is that it should not be due to the act or election of the party." per Lord Wright at p.530

Lord Wright distinguished the case of ***Bank Line Ltd. v. Arthur Capel & Co.*** **[1919]** on the basis that in the earlier case there had not really been a free choice by the shipowners as to which ship to cede to the Admiralty.

"A reference to the record in the House of Lords confirms Lord Sumner's view that the court below had not considered the point, nor had they evidence or material for its consideration. Indeed, in the war time the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability. However, the point does directly arise in the facts before the Board, and their Lordships are of the opinion that the loss of the St. Cuthbert's licence can correctly be described, quoad the appellants, as "a self-induced frustration"." per Lord Wright at p.530[21]

41.4 The court's decision on self-inducement may be swayed by policy considerations.

[21] A similar decision was reached in ***The Super Servant Two*** **[1990] 1 Lloyd's Rep 1**

41.5 ***F.C. Shepherd & Co. Ltd. v. Jerrom*** **[1987] QB 301 (CA)**

A youth who was sent to Borstal claimed that this could not frustrate his contract of employment as he had induced the event himself by committing the crime! The Court of Appeal was not impressed!

"If a party against whom frustration is asserted can by way of answer rely on his own misconduct, injustice arises." per Lawton L.J. at p.319
In the event, the Court of Appeal found that there had not been any self-inducement anyway.

"The apprentice's criminal conduct was deliberate, but it did not by itself have any consequences upon the performance of his contract. What affected performance was his sentence of Borstal training which was the act of the judge and which he would have avoided if he could have done so. It cannot be said, I think, that the concept of "self-induced" frustration can be applied to this case." per Lawton L.J. at p.318

41.6 The onus of proving that the frustration was self-induced is on the person trying to establish that it was.

41.7 ***Joseph Constantine SS Line Ltd. v. Imperial Smelting Corp. Ltd.*** **[1942] AC 154 (HL)**

To a claim by charterers against shipowners for damages for failure to deliver a cargo, the shipowners pleaded that an explosion on the ship had frustrated the chartered voyage. The cause of the explosion was not ascertained. It was held that the shipowners, having established that the explosion had frustrated the commercial object of the adventure, were not bound further to prove that the explosion was not due to their neglect or default. The defence of frustration succeeded.

"The Court of Appeal was mistaken in holding that once the frustration in fact was established and any inference of default alleged to arise from the fact that the ship was under the control of the appellants' servants was negatived, it lay on the appellants to go further and satisfy the arbitrator positively that the frustration occurred without their default." per Viscount Simon L.C. at p.166

42 FRUSTRATION OF LEASES

42.1 The general principle is that a lease, being an interest in land, cannot be frustrated even if the purpose of the lease is defeated, as an interest in land has a special legal value beyond its use. However, in two House of Lords cases, it was conceded *obiter* that in extreme cases (such as the land being swallowed up by an earthquake) it might be possible to frustrate a lease.

42.2 ***Cricklewood Property Investment Trust v. Leighton's Investment Trust Ltd.*** **[1945] AC 221 (HL)**

A ninety-nine-year building lease was granted in 1936 of certain land at Potters Bar on which the lessees were to build a number of shops for the benefit of the lessors. Wartime restrictions meant that it became impossible to build the shops, and the lessees claimed that the contract was thus frustrated. The House of Lords was divided on the question of whether there could ever be frustration of a lease. Viscount Simon and Lord Wright thought that there could; Lord Russell and Lord Goddard thought that there could not; and Lord Porter reserved his opinion. However, on the facts, they held unanimously that even if the doctrine of frustration could apply to a lease, it did not apply here as the restrictions were only temporary and were not for a significant period in relation to the whole term of the lease.

"Where the lease is a simple lease for years at a rent, and the tenant, on condition that the rent is paid, is free during the term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration - though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. The lease, it is true, is of the "site, " but it seems to be not inconceivable that, within the meaning of the document the "site" might cease to exist. If, however, the lease is expressed to be for the purpose of building, or the like, and if the lessee is bound to the lessor to use the land for such purpose with the result that at the end of the term the lessor would acquire the benefit of this development, I find it less difficult to imagine how frustration might arise.

"Suppose, for example, that legislation were subsequently passed which permanently prohibited private building in the area or dedicated it as an open space for ever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessee and lessor, of buildings which it would now be unlawful to construct?"
per Viscount Simon at p.229

42.3 ***National Carriers Ltd. v. Panalpina (Northern) Ltd.*** **[1981] AC 675 (HL)**

A street closure order disabled a warehouse for eighteen months out of a four-and-a-half-year lease. The House of Lords took the view that in rare circumstances a lease may be frustrated, but held that there was no frustration in this case.

"This discussion brings me to the central point at issue in this case which, in my view, is whether or not there is anything in the nature of an executed lease which prevents the doctrine of frustration, however formulated, applying to the subsisting relationship between the parties. That the point is open in this House is clear from the difference of opinion expressed in Cricklewood Property Investment Trust v. Leighton's Investment Trust Ltd. [1945] between the second Lord Russell of Killowen and Lord Goddard on the one hand, who answered the question affirmatively, and Viscount Simon L.C. and Lord Wright on the other, who answered it negatively, with Lord Porter reserving his opinion until the point arose definitively for consideration. The point, though one of principle, is a narrow one.

"It is the difference immortalised in H.M.S. Pinafore[22] between "never" and "hardly ever," since both Viscount Simon and Lord Wright clearly conceded that, though they thought the doctrine applicable in principle to leases, the cases in which it could properly be applied must be extremely rare.

"In the result, I come down on the side of the "hardly ever" school of thought. No doubt the circumstances in which the doctrine can apply to leases are, to quote Viscount Simon L.C. in the Cricklewood case, at p.231, "exceedingly rare." Lord Wright appears to have thought the same, whilst adhering to the view that there are cases in which frustration can apply, at p. 241. But, as he said in the same passage: "... the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula." To this school of thought I respectfully adhere. Like Lord Wright, I am struck by the fact that there appears to be no reported English case where a lease has ever been held to have been frustrated. I hope this fact will act as a suitable deterrent to the litigious, eager to make legal history by being first in this field. But I am comforted by the implications of the well-known passage in the Compleat Angler[23] on the subject of strawberries: "Doubtless God could have made a better berry, but doubtless God never did." I only append to this observation of nature the comment that it does not follow from these premises that He never will, and if it does not follow, an assumption that He never will becomes exceedingly rash." per Lord Hailsham at p.688/692

42.4 Although there are no English cases where a lease has been held to be frustrated, there is at least one House of Lords (Scotland) case where a lease *was* held to be frustrated. This was on the basis that it was granted for a specific purpose which could no longer lawfully be achieved.[24]

[22] 'HMS Pinafore' is a celebrated Victorian comic operetta by Gilbert and Sullivan, in which Captain Corcoran, of the ship HMS Pinafore, swears that he is never sick at sea and never swears – well, hardly ever.

[23] 'The Compleat Angler' is a classic guide to the joys of fishing, written in 1653 by Izaak Walton. It is one of the most reprinted books in the history of British letters.

[24] See ***Denny, Mott & Dickson v. James B. Fraser & Co. Ltd.*****[1944] AC 265**

IV: THE EFFECT OF FRUSTRATION

43 TERMINATION OF THE CONTRACT AT COMMON LAW

43.1 The effect of frustration is to terminate the contract as at the time of the frustrating event. The contract is not void *ab initio* (as it would be for an operative mistake), nor is it voidable (as it would be for a misrepresentation). The contract is discharged as a matter of law (rather than by the choice of the parties) and thus it is not possible to affirm it.

43.2 ***Islamic Republic of Iran Shipping Lines v. Steamship Mutual Underwriting Association (Bermuda) Limited*** **[2010] EWHC 2661 (Comm)**

"Frustration operates automatically and does not depend on choice." per Beatson, J. at para 119

43.3 ***Hirji Mulji v. Cheong Yue Steamship Co.*** **[1926] AC 497 (HL)**

By a charter party entered into in November 1916, shipowners agreed to place their ship, the Singaporean, at the charterers' disposal on March 17th 1917 for 10 months. The ship was requisitioned before this date, at which time the shipowners asked the charterers if they would be willing to take up the charter when the ship was released. The charterers said they would, but the ship was not released until February 1919, and the charterers refused to accept it. The shipowners claimed that the charterers had affirmed the contract after frustration, and so were bound by it. The House of Lords held that this was not possible.[25]

44 DISTRIBUTION OF THE LOSS AT COMMON LAW (NOW OF HISTORICAL INTEREST ONLY)

44.1 As no-one is to blame when a contract is frustrated, there is no question of one party paying the other damages. However, it is likely that one of the parties may have incurred expenses in performing the now-defunct contract; or one may have had some quantifiable benefit out of it.

44.2 The common law was ambivalent about how, if at all, these expenses/benefits should be accounted for or shared between the parties. Various rules emerged from the cases, all of which have now been OVERRULED by statute. Cases decided prior to the statute are therefore of historical interest only, and should not be cited if giving current legal advice.

44.3 Rights which had not yet accrued at the time of the frustrating event were not recoverable.

44.4 ***Appleby v. Myers*** **(1867) LR 2 CP 651**

A contract for the erection of machinery in a factory stipulated that payment should be made only on completion of the work. When most of the work had been done, the factory (and the machinery) burnt down. It was held that no payment was due for the machinery as the rights to it had not accrued before the contract was terminated. Thus, despite their expenses to date, the sellers of the machinery suffered the entire loss caused by the frustration.

44.5 Under the old common law, rights which had accrued before the frustration were recoverable, even if the total benefit of the contract had been destroyed.

[25] See also ***Collins v. Secretary of State for Trade and Industry*** **[2001]**

44.6 ***Chandler v. Webster*** **[1904] 1 KB 493**

This was a coronation case, where a room was rented to see Edward VII's doomed coronation procession. Unlike in Krell v. Henry, the contract provided that payment should be made in advance, rather than at the date of the coronation, so the hirer had already paid the money at the time the contract was frustrated by the cancellation of the coronation. He was unable to recover his money, because at the time it was paid, the contract was still in existence.

44.7 Under the 'revised' common law, rights which had accrued before the frustration were NOT recoverable, if the total benefit of then contract had been destroyed.

44.8 The rule in ***Chandler v. Webster*** was considered to be unfair, so the House of Lords invented an equally unfair, diametrical opposite rule in 1943.

44.9 ***Fibrosa Spolka Akcyina v. Fairburn, Lawson, Combe, Brabour Ltd.*** **[1943] AC 32 (HL)**

An English company agreed to sell machinery to a Polish company for £4,800 [£143,780], of which one third was to be paid with the order. Delivery was to be made within three months at Gdynia, Poland. Only £1,000 [£29,955] was paid with the order, and before delivery could be made, Britain declared was on Germany and Gdynia was occupied by the Germans. The English company sued for the return of their £1,000. The House of Lords overruled Chandler v. Webster, and held that where the frustrating event caused the consideration wholly to fail, then no payment was due and payments already made could be recovered.

44.10 This rule was also seen as unfair because:

1) it might cause injustice to the payee who had expended money on the contract; and

2) it only applied where there was a total failure of consideration.

44.11 To resolve these problems, Parliament discarded all the cases and passed the **Law Reform (Frustrated Contracts) Act 1943**. This is not much better!

45 RECOVERY OF PAYMENTS AND EXPENSES UNDER THE STATUTE

45.1 The Law Reform (Frustrated Contracts) Act 1943 does not define frustration nor explain when it will or will not occur. Thus, it is entirely incorrect to describe a contract as having been frustrated 'under the 1943 Act'. So do not do so!

45.2 All the Act does do, assuming that frustration has been established at common law, is to provide for the redistribution of payments, expenses and benefits accrued. It does this in a most perplexing manner.

45.3 n.b. Under s.2, the Act does not extend to all contracts. In particular, it does not apply to some charter parties; some contracts of insurance; and contracts for the sale of specific goods (which are covered by the Sale of Goods Act 1979 s.7). Nor does the Act apply where it is expressly excluded by the contract.

45.4 **LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943, s.1(2)**

All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable…

42.5 This is similar to the Fibrosa doctrine, in that all monies paid over must be paid back, and there can be no claim for any outstanding debts under the contract, even if they occurred before the frustrating event. However, unlike Fibrosa, there is no requirement for a total failure of consideration before repayments must be made.

45.6 The section continues…

LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943, s.1(2)

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge, in, or for the purposes of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

45.7 Thus, a party who has spent money on performing the contract may be able to recover some or all of it from the other party. However, there are three limitations to such a claim:

i. Expenses may only be claimed up to the amount actually spent in performance of the contract. Thus, loss of profits etc. are not recoverable. The claimant has to produce receipts and link them directly to the requirements of the contract.

ii. Subject to the above requirement, the maximum that can be claimed in expenses is the amount that the claimant was owed, or had already been paid under the contract at the time of the frustration. Thus, if no payment was due to the claimant under the contract until performance was complete, then at the time of frustration no money would have been due, and so none can be claimed as expenses! (This harks back to Appleby v. Myers.)

iii. However, much may potentially be claimed in expenses under the first two requirements, the actual amount awarded is entirely up to the judge, based on what he or she considers to be 'just' in 'all the circumstances'.

45.8 Treitel suggests that the only 'just' thing to do is to divide the expenses equally between the parties, but though this may often be done in practice, it is clearly not a requirement. The judge can do whatever he or she wants.

45.9 ***Gamerco S.A. v. I.C.M./Fair Warning (Agency) Ltd.*** **[1995] 1 WLR 1226**

The plaintiffs were pop concert promoters; the defendants were Guns 'n' Roses. Guns 'n' Roses were to be paid over US$1.1 million for a concert in the Vincente Calderon Stadium in Madrid.

Three days before the concert, Madrid City Council sensibly banned the use of the stadium, claiming that it was unsafe. As no alternative venue could be found, the contract was frustrated.

The promoters had paid the pop group US$412,500 in advance, and wanted it back. Both parties had incurred wasted expenditure before the time of the frustration: the defendants claimed to have spent US$50,000; the plaintiffs claimed to have spent US$450,000. Under s.1(2) the promoters were clearly entitled to a refund of their US$412,500 and the balance owed to the pop group ceased to be payable. The issue was to what extent the defendants could set off against that figure the US$50,000 expenses they claimed to have incurred.

Garland J. considered the various theories as to how expenses incurred ought to be dealt with under s.1(2) and saw that there had been three approaches suggested.

i) to allow the payee to retain all the expenses incurred (as favoured by the Law Revision Committee in 1939);
ii) to divide the losses equally between the parties;
iii) to do whatever the judge thought just in all the circumstances

Garland J. considered that the last of these was clearly his duty. In the circumstances of this case, as the promoters themselves had suffered loss, and particularly given that the expense accounts of Guns 'n' Roses were in total disarray, he ordered repayment of the US$412,500 with no deduction for expenses.

46 COMPENSATION FOR VALUABLE BENEFITS

46.1 Even though the contract has not been entirely fulfilled, it may be that one of the parties has gained some valuable benefit from the part performance: he may have received part of an order, or used a building for part of a licensed time.

46.2 **LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943, s.1 (3)**

Where any party to the contract has, by reason of anything done by the other party thereto, in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular-

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

46.3 Calculation of the amount payable by the person who has received a benefit is a two-stage test:

1) Identification and valuation of the benefit;

2) Calculation of the sum (not exceeding the benefit) the court considers it to be just to award.

46.4 It is not clear from s.1(3) how the benefit is to be valued. In particular, should the value of the benefit be measured as it was before the frustrating event or after it, given that the frustrating event itself may often destroy the benefit (as in Appleby v. Myers)?

46.5 The answer was given in *BP Exploration Co. (Libya) Ltd. v. Hunt (no. 2)* [1982] 1 All ER 925 (HL): The benefit must be valued as it remained (if at all) after the frustrating event, so if the event destroys the benefit provided by one of the parties, that party can no longer claim for it against the former beneficiary. Treitel doubts whether this interpretation is correct, but it was approved by the House of Lords.

46.6 Richard Stone gives a useful example of the operation of s.1 (3)

"Suppose, then, that A has contracted to hire B's hall for a series of 10 concerts, with the entire fee payable at the end of the contract. If after one concert, the hall is destroyed by fire, under the common law, B would not be able to recover anything from A. By virtue of s.1 (3), however, B would be entitled to seek compensation from A in relation to the use of the hall for the one concert that took place."

46.7 Claims for unwarranted benefits can also be dealt with under the doctrine of Restitution.

PART THREE: MISTAKE

I: GENERAL PRINCIPLES

47 THE EFFECT OF AN OPERATIVE MISTAKE

47.1 In general, where one or both of the parties make a mistake when entering a contract, this has no effect on the contract itself. It is still valid, and the parties must suffer the consequences of their mistakes. (*Caveat emptor*: Let the buyer beware!) However, in a limited category of cases at common law, the court will find that a mistake is so fundamental to the existence of a contract that it renders the contract void *ab initio*. Such a mistake is known as an 'operative mistake'.

47.2 The courts are very reluctant to find that a mistake is operative, as there may be serious repercussions. In particular, as the contract will be void *ab initio*, property in sold goods cannot have passed from the original seller. In other words, whoever owned the goods in the first will still do so, even though the goods may have been 'sold' to an innocent third party.

48 CATEGORIES OF OPERATIVE MISTAKE

48.1 There are various ways of categorising operative mistakes. Unfortunately, these are not used consistently either by judges or academics.

1) Common Mistake. (Sometimes called 'Common Initial Mistake' or 'Possibility Mistake'.) This is where both parties agree to the same thing, but are mistaken as to the possibility that it can be carried out. This will be the case where the property to be sold does not actually exist (known as *res extincta*) or it already belongs to the buyer (known as *res sua*). The courts often refer to common mistake as 'mutual mistake'. This is particularly confusing, as the expression 'mutual mistake' is also used to describe an agreement mistake.

2) Quality Mistake. This is a sub-category of Common Mistake, where it is possible for the contract to be performed, but both parties believe that the subject-matter of the contract has a fundamental quality which, in fact, it does not possess. The application of this principle appears to be extremely limited.

3) Mutual Mistake. (Sometimes called Agreement Mistake or Consensus Mistake.) This is where the parties were talking at cross-purposes, so they have not actually reached an agreement at all.)

4) Unilateral Mistake. This is where one of the parties is making a fundamental mistake as to a fact of which the other party is aware. This usually involves fraud and may give rise to an alternative action for misrepresentation.

48.2 In ***Bell v. Lever Bros. Ltd.*** **[1932] AC 161 (HL)** Lord Atkin classified operative mistakes as those which either "negative" consent (where there has never been an actual agreement, as in mutual and unilateral mistakes) and those which "nullify" consent (where there is an agreement but it is based on a fundamental misapprehension which makes it impossible to perform, as in common mistakes.)

48.3 Lord Denning considered that there was no such thing as an operative mistake at law! He thought that contracts which are declared void for being impossible (common mistakes) are merely examples of there being no contract at all since an implied condition precedent has not been fulfilled. Similarly, when the parties are at cross purposes (mutual mistakes), there has never actually been a contract to declare void as there has been no proper consensus. All other examples of operative mistake are misconceived. He claimed that such contracts cannot be void, but can only be voidable in equity: ***Solle v. Butcher*** **[1950] 1 KB 671 (CA)**

However, the Court of Appeal has denounced his theories, which are now considered to have been misconceived*:* ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.*** **[2003] QB 679**

II: COMMON MISTAKE

49 THE MODERN CRITERIA

49.1 The modern leading case on Common Mistake is ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.*** **[2003],** where Lord Phillips M.R. set out the key elements.

Great Peace Shipping Ltd. v. Tsavliris (International) Ltd. **[2003] QB 679 (CA)**

"Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake.

"...The following elements must be present if common mistake is to avoid a contract.

(i) there must be a common assumption as to the existence of a state of affairs;

(ii) there must be no warranty by either party that that state of affairs exists;

(iii) the non-existence of the state of affairs must not be attributable to the fault of either party;

(iv) the non-existence of the state of affairs must render performance of the contract impossible;

(v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

per Lord Phillips M.R. at paras 75 & 76

50 *RES EXTINCTA*

50.1 *'Res Extincta'* means 'the thing no longer exists' and describes cases where, before a contract is made, the thing which is the subject of commerce has ceased to exist – or perhaps never existed in the first place – but where both parties mistakenly believe that the thing does still exist.

50.2 There are numerous examples of cases where the parties have attempted to make a contract to do something which they later claim was fundamentally impossible to do at the time they agreed to it, though very few of them specifically mention the word 'mistake'.

Strickland v. Turner **(1852) 7 Ex. 208**

A bought from B an annuity on the life of C, but unknown to either party C was already dead! The contract was held to be void.

Couturier v. Hastie **(1856) 5 HL Cas 673**

X sold Y a cargo of Indian corn, which both parties believed to be in transit from Salonica. Unknown to either party the corn had begun to ferment on the ship and the captain had sold it at Tunis.

It was held that the contract contemplated that the goods actually existed. Since they did not, neither party was liable to the other. This case did not mention 'mistake' or *'res extincta'* or 'void contract', but it is frequently cited as authority for an example of an operative common mistake.

Scott v. Coulson **[1903] 2 Ch 249 (CA)**

A life insurance policy on Mr. A. Death (!) was sold for £460 in the belief that he was still alive. In fact he was already dead, so the policy had matured and was worth £777.

The contract was held to be void in law, as it had been entered into under a common mistake existing at the date of it.

***Griffith v. Brymer* (1903) 19 TLR 434**

Colonel Brymer M.P. agreed to pay Murray Griffith £100 to rent a room on St. James's Street for the purpose of viewing Edward VII's coronation on June 24 1902. Unknown to the parties, the king had appendicitis and the procession had been cancelled that morning.

The contract was therefore void for mistake (as opposed to being discharged by frustration.) The agreement was made on the supposition by both parties that nothing had happened which made performance impossible. This was a mis-supposition of the state of facts, which went to the whole root of the contract.

***Galloway v. Galloway* (1914) 30 TLR 531**

A man and a woman entered into a deed of separation in the mistaken belief that they were married. In fact, the man's first wife, whom he believed to be dead, turned up alive, so his second marriage was invalid.

It was held that the separation deed was void because there was a mutual mistake of fact which was material to the existence of an agreement.

***Barrow, Lane & Ballard Ltd. v. Phillips & Co. Ltd.* [1929] 1 KB 574**

A contract was made for "an indivisible parcel" of 700 bags of nuts. Unknown to the parties, at the time the contract was made 109 of the bags had been stolen. The contract was void.

***Dany Lions Ltd. v. Bristol Cars Ltd.* [2013] EWHC 2997 (QB)**

Dany Lions purchased a vintage Bristol 405 motor car. These cars were produced in 1955 in very small numbers (probably only 43) so this surviving car was extremely rare. DL contracted with Bristol Cars to renovate it for not more than £153,000. The list of renovations to be made was extensive and included the installation of an automatic gear-box. Bristol Cars then discovered that it was not possible to install an automatic gear-box without compromising the functionality of the car. They claimed *inter alia* that this amounted to a fundamental common mistake and refused to carry out any part of the contract on the basis that it was void.

HELD: Applying the criteria listed in ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.* [2003]**, the doctrine of mistake would not apply here. The defendant had simply warranted that he could fit the gearbox: there was no 'common assumption about a state of affairs'. Furthermore, the gearbox was only one in a long list of contractual obligations, the rest of which were unaffected, so the contract had not been rendered totally impossible to perform.

"Now, looking at those elements in the context of the issues in the present action: was there a common assumption as to the existence of a state of affairs such as to give rise potentially to a mistake? I think the answer obviously is no. The position simply was that the Defendant assumed a contractual obligation to supply and fit an automatic gearbox.

"Turning to the second element, there must be no warranty by either party that that state of affairs exists. There is some difficulty, as it seems to me, in describing as a state of affairs a situation which, at best, was no more than the Defendant believing that it could supply and fit an automatic gearbox to the car with the registration number NOR11. However, if and insofar as it is possible to describe that as a state of affairs, then, as it seems to me, the Defendant warranted to achieve that result by entering into a contract in the terms in which it did.

"It is not, I think, necessary to consider the third element identified in paragraph 76, but the fourth element: "The non-existence of the state of affairs must render performance of the contract impossible," is obviously important, because that was not the situation in the present case. Even assuming that the ability, or not, of the Defendant to supply and fit an automatic gearbox in the car amounted to a state of affairs, and even assuming that there was a common assumption as to the existence of such a state of affairs, the inability of the Defendant to perform its contractual obligation without adverse consequences for the performance of the car did not render performance of the contract impossible. The greater part of the contract was wholly unaffected by whether the automatic gearbox could be supplied and fitted or not. The supply and fitting of the automatic gearbox was but one element in a much more extensive range of works which the Defendant agreed to undertake.

"And then one comes to the fifth element identified in paragraph 76 in the Great Peace: "The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible." The supply and fitting of the automatic gearbox was obviously an important part of the work, but it was not fundamental to the whole contract such as to render impossible the performance of the contractual obligations of the Defendant, other than in relation to the supply and fitting of the automatic gearbox, even assuming in favour of the Defendant that that was actually the position. Consequently, as it seems to me, the matters needed to be demonstrated in order to justify the conclusion that the contract was void on the ground of common mistake have not been demonstrated." per HHJ Seymour QC at paras 25-28

50.3 The doctrine of *res extincta* will not avail someone to escape from the terms of the contract simply because of their negligent promises.

***McRae v. Commonwealth Disposals Commission (*1951) 84 CLR 377 (High Court of Australia)**

The defendants contracted to sell a wrecked oil tanker (and its contents) lying on Jourmaund reef which was said to contain oil. There was no such tanker in the area described and the plaintiff buyers sued for breach of contract. The defendants argued that the contract was void for mistake, using the doctrine of *"res extincta"* (the thing does not exist).

Whilst recognising that such a doctrine did exist, the court held that it did not apply here. The contract was valid and it included an implied promise by the defendants that there was a tanker in the specified position.

"The buyers relied upon, and acted upon, the assertion of the seller that there was a tanker in existence. It is not a case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations. The officers of the Commission made an assumption, but the plaintiffs did not make an assumption in the same sense. They knew nothing except what the Commission had told them. If they had been asked, they would certainly not have said: 'Of course, if there is no tanker, there is no contract'. They would have said: 'We shall have to go and take possession of the tanker. We simply accept the Commission's assurance that there is a tanker and the Commission's promise to give us that tanker.' The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified. The Commission contracted that there was a tanker there." per Dixon and Fullagar JJ.[26]

***Dany Lions Ltd. v. Bristol Cars Ltd.* [2013] EWHC 2997 (QB)** raises a similar issue.

[26] This case raises some interesting questions about the measure of damages, as the court could not assess how much the plaintiffs had lost by not salvaging a non-existent cargo. Instead, the award was measured by reference to wasted expenditure.

50.4 In a contract for the sale of goods, the matter of *res extincta* is now dealt with by the **Sale of Goods Act 1979 s.6**

SALE OF GOODS ACT 1979 s.6

Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

51 *RES SUA*

51.1 *'Res Sua'* means 'the thing is his', and describes the situation where someone mistakenly makes a contract to acquire something which they already own.

51.2 There is only one significant case where a contract was held to be void on these extraordinary grounds. However, it acquired an importance beyond its facts because of the use Lord Denning later made of it.

***Cooper v. Phibbs* (1867) LR 2 HL 149 (HL)**

Phibbs was acting as an agent for five sisters who believed that they had inherited outright their father's Irish fishery. He rented the fishery to the sisters' cousin Cooper, who then discovered that he in fact had a life interest in the fishery so that he was, in effect, being rented his own property. The contract was set aside as it was impossible to perform. This is an example of *res sua* (the thing is his).

51.3 There was some judicial debate as to whether this contract was void (at law) or voidable (in equity). Lord Denning took the latter view, and based on it a theory of mistake which confused the law for 50 years (in ***Solle v.* Butcher [1950] 1 KB 671**) until his views were set aside by the Court of Appeal in ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.* [2003] QB 679.**

III: MISTAKE AS TO QUALITY

52 MISTAKE AS TO QUALITY

52.1 This is a form of common mistake where both parties believe they are dealing with something with a particular, fundamental quality, which the thing does not in fact possess.

52.2 There has been a great academic and judicial debate as to whether a contract may be void simply because the subject matter does not have a quality it is thought to have.

52.3 In a series of cases on the issue, Lord Denning had much to say about the nature of operative mistakes in general. His views confused the law for many years, but have recently been discredited.

BELL v. LEVER BROTHERS

52.4 The central authority on both the existence of and criteria for an operative mistake as to quality is ***Bell v. Lever Brothers Ltd.* [1932] AC 161 (HL)**

***Bell v. Lever Brothers Ltd.* [1932] AC 161 (HL)**

Bell and Snelling, the chairman and vice-chairman of a company controlled by LB, were paid £50,000 for early termination of their contracts. It then transpired that the two men had been in breach of their service contracts by speculating in a rival business and LB would have been justified in dismissing them without compensation. LB attempted to have the severance contracts rescinded since they had contracted on the basis of a fundamental mistake: they thought the service contracts were valid when they were actually voidable.

The Court of Appeal upheld LB's claim, but the House of Lords reversed this decision. The mistake was only as to the quality of the service contract and was not fundamental enough to justify rescission.

"I feel the weight of the plaintiffs' contention that a contract immediately determinable is a different thing from a contract for an unexpired term, and that the difference in kind can be illustrated by the immense price of release from the longer contract as compared with the shorter... But, on the whole, I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contact is void if it turns out that the contract had already been broken and could be terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain."

per Lord Atkin at p. 223

However, in reaching their judgment, the House of Lords did acknowledge *obiter* that mistakes as to quality might sometimes be operative:

"Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing it was believed to be." per Lord Atkin at p. 218

"(Mistake as to the subject matter of the contract) can only properly relate to something which both must have necessarily accepted in their minds as an essential and integral element of the subject matter."

per Lord Thankerton at p. 235

Lord Atkin gave several examples of what would not constitute an operative mistake:

"A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. A agrees to take on a lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy, and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty...

"All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts - i.e. agree in the same terms on the same subject-matter - they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them." per Lord Atkin at p. 224

52.5 From the *ratio* and *dicta* of this and later cases, it is difficult to imagine what the courts would accept as an operative mistake as to quality. In ***Nicholson and Venn v. Smith-Marriott*** **(1947),** Hallet J. attempted to give the matter some consideration, though he does not seem to have helped the debate enormously.

Nicholson and Venn v. Smith-Marriott **(1947) 177 LT 189**

Antique dealers paid £747 for a set of linen napkins and table cloths bearing a royal coat of arms, which were described in the seller's auction catalogue as being the authentic property of Charles I. In fact they were Georgian and worth only £105. It was held that there was a breach of condition under s.13 of the Sale of Goods Act 1893. The court stated *obiter*:

"Clearly, in this case, as it seems to me, what the defendants were intending to sell and the plaintiffs intending to buy was not two fine table cloths and twelve fine table napkins as such, but something which I will describe as a Carolean relic. Using the language of Lord Atkin, I am disposed to the view that a Georgian relic, if there be such a thing - which I have no reason to suppose there is - is an 'essentially different' thing from a Carolean relic…

"I should be disposed therefore, though recognising the great difficulties of the point and without any undue confidence in the correctness of my judgment, to hold if necessary, that here there was a mutual mistake of the kind or category calculated to vitiate the assent of the parties and therefore to enable the plaintiffs to treat themselves as not bound by the contract." per Hallet J.

52.6 Treitel has a theory about this case. He suggests that if the parties are so concerned about a quality of the subject matter that they identify it by that quality, this will be an operative mistake.

"The transaction could be regarded in two ways. The parties may have intended to buy and sell antique table linen: in this case a mistake as to its exact age, provenance or value would not be fundamental. Alternatively, the parties may have intended to buy and sell a Carolean relic; in this case their mistake would be fundamental and make the contract void" (p.267)

"The suggested test for determining whether a mistake is fundamental, presupposes that both parties would give the same answer to the question "what are you contracting about?" If they would give different answers, the mistake, whatever else its effect may be, will not nullify consent. A seller may intend to sell antique table linen and the buyer to buy a Carolean relic. If the parties are thus at cross-purposes consent may be negatived." (p.269)

THE DENNING THEORY: MISTAKE IN EQUITY

52.7 Lord Denning did not believe that a contract could be declared void for mistake at common law. However, he did believe that where the mistake was fundamental, a court was entitled to 'set aside' the valid contract as a matter of EQUITY, and that, if a court did that, it could also insist that if the parties wished to continue with the contract, they should do so on new terms determined by the court.

52.8 He based this theory on a highly dubious interpretation of the House of Lords decision in ***Cooper v. Phibbs*** **(1867)** centred on the fact that Lord Westbury had said in that case that an agreement based on a common mistake was liable to be 'set aside', rather than saying it was 'void', even though he clearly meant the latter. However Denning's theory ran contrary to the clearer and more recent House of Lords decision in ***Bell v. Lever Brothers*****.** Indeed, when ***Bell v. Lever Brothers*** was in the Court of Appeal, Scrutton L.J. had specifically commented that the contract in ***Cooper v. Phibbs*** was actually 'void' rather than 'set aside'. All this did not trouble Denning!

52.9 ***Solle v. Butcher*** **[1950] 1 KB 671 (CA)**

Godfrey Solle rented a flat from Charles Butcher for seven years at a rent of £250 per annum. In 1938 the rent of the flat had been set at £140 per annum under the Increase of Rent and Mortgage Interest (Restrictions) Acts 1920 and 1938. Under these Acts the rent on that flat could only be increased from this at the beginning of a tenancy and then only if the property had been substantially improved and proper notice had been given to the prospective tenant. Following war damage, Butcher had made substantial improvements to the flat so that both he and Solle (who was his partner) thought it had "lost its identity" as the original flat, and so no notice was necessary under the Acts. Following a dispute, Solle claimed that the proper rent should have been £140 under the Act, and since the tenancy had begun, he was entitled to keep the flat at the lower rent for the rest of the seven years, as well as getting his excess back-rent returned. Butcher pleaded *inter alia* that if the Acts did apply, there had been a common mistake of fact, and that the lease was therefore void.

It was held that the flat had not lost its identity, so the Acts did apply. The improvements were such as to warrant the rent of £250, but it was now too late for Butcher to give notice of the rise since the lease had started. However, there had been a fundamental common misapprehension as to a fact. Such a mistake could not make the contract void in law, but it could make it voidable in equity.

Denning L.J. was of the opinion that contracts could only be held void if the mistake was such as to prevent the formation of any contract at all (i.e. if the parties had not reached an agreement or the supposed contract was never possible.) All other mistakes, however fundamental, could only render the contract voidable in equity. Early cases where a contract had apparently been held void for a "quality" mistake (including identity mistake cases) were merely examples of the common law courts artificially extending the law to do justice in the case in hand before the fusion of law and equity. He specifically disagreed with the obiter in Nicholson and Venn v. Smith-Marriott that the contract in that case was void from the beginning (which throws some doubt on Treitel's analysis of that case).

"Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v. Lever Bros. Ltd. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.

"Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are really contracts which are not void for mistake but are void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance." per Denning L.J. at p.692

52.10 Although Denning said he was applying ***Bell v. Lever Brothers***, he patently was not doing so. He was inventing a new rule of equity, which had not been applied by the House of Lords *in* ***Bell v. Lever Brothers*** because it did not exist.

52.11 To support this view, Denning relied on the decision in ***Cooper v. Phibbs***. Although the tenancy contract in that case was declared void in law, there were other parties with rights to the property in question and an order was made to the effect that Cooper should respect those rights. Denning claimed that the House of Lords had thus held the contract to be valid in law, but had used their equitable discretion to 'set it aside' on terms'. In fact, there were two different processes going on: the contract being declared void in law followed by equitable relief being granted to the other interested parties.

52.12 Denning applied his theory in another case that year.

Leaf v. International Galleries **[1950] 2 KB 86 CA**

Ernest Louis Leaf bought a painting called "Salisbury Cathedral" from International Galleries for £85. At the time of the purchase, both parties believed the painting was by John Constable. When Leaf tried to sell it five years later he discovered it was not by Constable and claimed the right to rescind the contract by returning the painting and recovering his £85. The Court of Appeal accepted that there was a mistake about the quality of the subject-matter but held that this was not enough to render the contract void.

"This was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract: there was no mistake at all about the subject-matter of the sale. It was a specific picture, "Salisbury Cathedral." The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract." per Denning L.J. at p.89

Denning L.J. stated *obiter* that it was a condition of the contract that the painting should be by Constable, and the buyer could therefore have repudiated it in law had he not kept the painting for so long. He would also have had a right to damages, except that he did not claim them!

52.13 19 years later, Denning was still adamant about his theory…

Magee v. Pennine Insurance Co. Ltd. **[1969] 2 QB 507 (CA)**

Thomas Magee (58) who could not drive, bought a car for his 18 year old son, John. He signed an insurance policy, the details of which were written in by the garage owner. It wrongly stated that the insurance was to cover not only John but also both Thomas (on a provisional licence) and his elder son of 35. The car was insured on that basis (which somewhat reduced the premiums payable). Four years later John drove the car into a shop window, thus writing it off. Thomas claimed £600 under the policy, but settled with the insurers for £385.

The insurance company then discovered the inaccuracies in the proposal form and sought to have the settlement aside on the basis of the common fundamental mistake by the parties that the insurance policy was valid (when in fact it was not because of the inaccuracies.) The insurers claimed that had they known the policy was invalid, they would not have offered a settlement.

HELD: There was a common fundamental mistake, but this did not make the contract of settlement void. However, it was voidable in equity, and under the circumstances, the insurers were entitled to have it set aside.

Lord Denning M.R. was in his usual dismissive mood as regards the House of Lords' precedent:

"What is the effect in law of this common mistake? Mr. Taylor (counsel for Magee) said that the agreement to pay £385 was good, despite this common mistake. He relied much on Bell v. Lever Bros. Ltd. and its similarity to the present case. He submitted that, inasmuch as the mistake there did not vitiate that contract, the mistake here should not vitiate this one. I do not propose today to go through the speeches in that case. They have given enough trouble to commentators already. I would simply say this: A common mistake, even on a most fundamental matter, does not make a contract void at law: but it makes it voidable in equity." per Lord Denning M.R.at p.514

THE DEMISE OF THE DENNING THEORY

52.14 Denning's theory was not universally accepted (which is hardly surprising) and although followed in some cases, it was simply ignored or distinguished in others.

52.15 ***Sheikh Brothers Ltd. v. Arnold Julius Ochsner*** **[1957] AC 136 (Privy Council - Eastern Africa)**

By a licence agreement the appellant leased about 5,000 acres of land in Kenya to the respondents on terms that the respondents would produce at least 50 tons of sisal per month. In fact, this proved to be impossible as, even with the best cultivation methods, the land could not produce that much sisal. The Privy Council, applying the test in Bell v. Lever Bros. Ltd., held that it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month. It followed that the mistake was as to a matter of fact essential to the agreement.

The contract was declared void, but this was under the Indian Contract Act 1872 rather than at common law. The Privy Council did not consider Solle v. Butcher at all, although it was mentioned in passing by counsel for the appellant (who lost).

52.16 ***Amalgamated Investment and Property Co. Ltd. v. John Walker and Sons Ltd.*** **[1976] 3 All ER 509 (CA)**

The defendants owned a commercial property which they proposed to sell. The property was advertised as being suitable for redevelopment, and the plaintiff agreed to purchase the property for £1,710,000. Unknown to the parties, the Department of the Environment was considering the property for listing. The day after the contract was signed, the plaintiffs received notice that the property had been unconditionally listed, which reduced its value by £1,500,000. The plaintiffs claimed in the alternative, rescission of the agreement on the ground of common mistake or a declaration that the agreement was void or voidable, and an order rescinding the agreement.

It was held that the contract could not be void for mistake as the mistake (the actual listing) did not exist at the time of the contract, even though the parties might well have been affected if they had known that the property was even being considered as a listed building.

"The crucial date, in my judgment, is the date when the list was signed. It was then that the building became a listed building, and it was only then that the expectations of the parties (who no doubt both expected that this property would be capable of being developed, subject always of course to obtaining planning permission, without it being necessary to obtain listed building permission) were disappointed... In my judgment, there was no mutual mistake as to the circumstances surrounding the contract at the time when the contract was entered into. The only mistake that there was, was one which related to the expectation of the parties. They expected that the building would be subject only to the ordinary town planning consent procedures, and that expectation has been disappointed. But at the date when the contract was entered into I cannot see that there is any ground for saying that the parties were then subject to some mutual mistake of fact relating to the circumstances surrounding the contract."

per Buckley L.J. at p. 515

This could be read as meaning that if the property had been listed at the time of the contract, it would have been void for mistake, in which case it would have run contrary to the judgment in Solle v. Butcher. Unfortunately, the Court of Appeal chickened out from discussing this possibility.

"We have heard an interesting argument whether Solle v. Butcher can stand as good law with Bell v. Lever Brothers Ltd.. That is not a matter on which I think it is necessary for us to embark, and I do not propose to say anything about it." per Buckley L.J.at p.516

52.17 The real turn-around came five years after Lord Denning's retirement, when Steyn J. explained the doctrine of quality mistake by reference solely to the House of Lords case, and not at all to Lord Denning's theory, which he dismissed as being inconsistent with the House of Lords' decision. (Hurrah!)

***Associated Japanese Bank (International) Ltd. v. Credit du Nord SA* [1989] 1 WLR 257**

Jack Bennett made a sale and leaseback contract with AJB whereby the bank would buy four precision engineering machines from Bennett for £1,021,000, which the bank would then lease back to him. Bennett's obligations under the leaseback agreement were guaranteed by CdN. Both banks believed that the machines existed, but in fact the whole deal was a fraud perpetrated by Bennett, who (not surprisingly) did not keep up the payments on the lease. AJB claimed the outstanding rent from Bennett who promptly went bankrupt, so AJB sued CdN as guarantors. CdN refused to pay, contending*, inter alia*, that the guarantee was subject to an express or implied condition precedent that the machines in fact existed and therefore the guarantee was void *ab initio* for common mistake.

HELD: There was either an express condition precedent in the guarantee that there was a lease in respect of four existing machines, or an implied condition precedent that the guaranteed lease related to existing machines. In either case, the guarantee was void and the claim by AJB failed.

In a lengthy *obiter dictum*, Steyn J. analysed the decision in Bell v. Lever Bros. Ltd. and summarised what he understood to be the requirements for an operative mistake as to quality, equating the issue to that of contractual frustration.

"The first imperative must be that the law ought to uphold rather than destroy apparent contracts.

"Second, the common law rules as to a mistake regarding the quality of the subject matter, like the common law rules regarding commercial frustration, are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts.

"Third, such a mistake in order to attract legal consequences must substantially be shared by both parties, and must relate to facts as they existed at the time the contract was made.

"Fourth... the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist..."

"Fifth, there is a requirement which was not specifically discussed in Bell v. Lever Bros. Ltd.. ... In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such a belief." per Steyn J. at p. 912

As for Lord Denning: *"With the profoundest respect to the former Master of the Rolls, I am constrained to say that in my view his interpretation of Bell v. Lever Brothers Ltd. does not do justice to the speeches of the majority."* per Steyn J. at p.267

52.18 This *obiter* was confirmed, and Denning's theory firmly trounced, by the Court of Appeal's decision in ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.*** **(2003).**

52.19 ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.*** **[2003] QB 679 (CA)**

In September 1999, the "Cape Providence" (a ship) was on her way from Brazil to China with a cargo of iron ore when she suffered damage in the South Indian Ocean. There was a serious concern that the ship might sink with the loss of her crew and an urgent salvage contract was made with Tsavliris. As it would take five or six days for a tug to reach the "Cape Providence" Tsavliris tried to find a merchant vessel in the area that would be able to assist in the evacuation of the crew if necessary. They contacted Ocean Routes, a weather forecasting company which received information about vessels at sea, and were told that the "Great Peace" was within twelve hours of "Cape Providence".
On that basis, Tsavliris chartered the "Great Peace" for a minimum of five days to escort and stand-by "Cape Providence" for the purpose of saving life if necessary.

However, Ocean Routes - and therefore Tsavliris - were mistaken as to the whereabouts of the "Great Peace". It was actually 410 miles - 39 hours - away. The owners of the "Great Peace" had never suggested otherwise, as in the urgency of the situation the matter was never discussed. When another nearer vessel was able to attend the "Cape Providence", Tsavliris cancelled the "Great Peace" contract and refuse to pay. When they were sued, Tsavliris contended that either the contract was void in law because of a fundamental mistake (as per Bell v. Lever Brothers) or, if not, it was voidable in equity (as per Solle v. Butcher).

HELD: Applying Bell v. Lever Brothers, and especially Steyn J.'s interpretation of it in Associated Japanese Bank (International) Ltd. v. Credit du Nord SA [1988], the Court of Appeal held that a contract CAN be rendered void by a fundamental mistake as to its quality, but that this contract was not so rendered. (Although the services of a ship 39 hours away were not as good as those of a ship only 12 hours away, this did not make it a fundamentally different contract. This was especially clear as the hirers did not cancel the contract until they found a better alternative.) Furthermore, if a contract is not void at common law for mistake, it is valid, and the court has no discretion to use equity to 'set it aside' or to alter its terms. In other words, Denning was wrong!

"The effect of Solle v. Butcher is not to supplement or mitigate the common law; it is to say that Bell v. Lever Brothers was wrongly decided. Our conclusion is that it is impossible to reconcile Solle v. Butcher with Bell v. Lever Brothers." per Lord Phillips M.R. at paras 156/157

52.20 Several interesting principles arise from this case:

1. The test for whether a mistake makes a contract 'fundamentally' different is, in essence, the same as the test applied to see whether a dramatic change in circumstances will cause a valid contract to be discharged by frustration of purpose. Just as in frustration, a mistake will not render the contract void if it is the fault of either party or was provided for in the contract:[27] *"Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake."*

[27] n.b. If the mistake is the fault of one of the parties, the contract may be voidable for misrepresentation.

2. If a contract is void, there is no question of setting it aside in equity as there is no contract to set aside.

3. If a contract is not void, it is valid and binding. The court has no equitable discretion to set it aside, on terms or otherwise. Lord Denning's interpretation of Cooper v. Phibbs was erroneous as was his suggestion that the House of Lords in Bell v. Lever Brothers had merely forgotten to exercise their equitable jurisdiction: *"The House of Lords in Bell v. Lever Brothers considered that the intervention of equity, as demonstrated in Cooper v. Phibbs, took place in circumstances where the common law would have ruled the contract void for mistake. We do not find it conceivable that the House of Lords overlooked an equitable right in Lever Brothers to rescind the agreement, notwithstanding that the agreement was not void for mistake at common law. The jurisprudence established no such right."*
per Lord Phillips at para 118

IV: MUTUAL MISTAKE

53 MEANING AND EFFECT OF A MUTUAL MISTAKE

53.1 'Mutual mistake' usually indicates that the parties are talking at cross-purposes and so have not reached an agreement.

***Raffles v. Wichelhaus* (1864) 2 H&C 906**

The defendants agreed to buy "125 bales of Surat cotton to arrive ex Peerless from Bombay." There were two ships called Peerless, both sailing from Bombay. One was leaving in October, the other in December. The defendants were referring to the former, the plaintiffs to the latter. It was held that as there was no consensus *ad idem*, there was no contract.[28]

53.2 ***Scriven Brothers & Co. v. Hindley* [1913] 3 KB 564**

An auctioneer was instructed to sell bales of hemp and bales of tow. It was not indicated in the catalogue that some bales were hemp and some were tow. The defendants examined a sample, which was hemp, and then bid an exorbitant price for a bale of tow believing it to be hemp. It was held that the parties were not ad idem and that there was no contract.

53.3 The test for an operative mutual mistake is whether, from an objective viewpoint, there is such a degree of ambiguity that it is impossible to say that the parties intended to be bound by one set of terms or the other. Where the mistake is simply a result of the carelessness of one of the parties, the doctrine of *caveat emptor* will apply.

53.4 ***Smith v. Hughes* (1871) LR 6 QB 597 (CA)**

Smith offered to sell some oats to Hughes and showed him a sample. Hughes, due to his own carelessness, though the oats were "old", when in fact they were "green" and ordered sixteen quarters for £34 15s 8d. When he discovered they were "green" he refused to accept them. Smith sued for his money. HELD: Smith had not misrepresented the oats as old, so Hughes was bound to pay for them.

"Where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty-as where, for instance, an article is ordered for a specific purpose-and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract."
per Cockburn C.J. at p. 603

[28] The judgment in this case does not actually mention 'mutual mistakes' or 'void contracts', but it is nevertheless generally taken to be the leading case on this principle.

53.5 ***Tamplin v. James* (1880) 15 ChD 215**

The defendant bought an inn and adjoining premises at an auction, believing the estate to include two pieces of garden occupied within the inn. Had he checked the plans, which were available for inspection, he would have seen that the gardens were not included. It was held that he was bound by the contract.

"Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade performance of it by the simple statement that he has made a mistake." per Baggallay L.J. at p.217

V: UNILATERAL MISTAKE

54 UNILATERAL MISTAKES AS TO THE TERMS OF THE CONTRACT

54.1 Mistake as to terms is rarely operative, but where one party knows the other has made a fundamental mistake as to the terms, the contract may be void.

54.2 ***Hartog v. Colin and Shields* [1939] 3 All ER 566**

The defendants mistakenly offered to sell 30,000 Argentine hare skins to the plaintiffs at a price per pound instead of per piece, a piece being about one third of a pound. It was obvious from the pre-contractual negotiations and normal trade practice that the intention was to sell the hare skins per piece. It was held that contract was void for mistake.

"The offer was wrongly expressed, and the defendants...have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerers' real intention."

per Singleton J. at p.568

55 UNILATERAL MISTAKES AS TO IDENTITY

55.1 A series of cases has illustrated the effects of making a mistake as to the identity of the other party to the contract. Such mistakes have usually been induced by fraud, so the victim would have the option of suing for misrepresentation. However, fraud would only render the contract voidable (rather than void), so if title to the property in question has passed to a *bona fide* third party purchaser without the contract having been avoided, the victim of the fraud will not be able to recover it.

55.2 For a mistake as to identity to be operative, the victim must show that the **identity** of the party was fundamental to him, and not simply that he was concerned with his **creditworthiness**. (Lord Denning disputed this analysis, as he thought that there was no such thing as an operative mistake as to identity in law.) In truth, it is normally only creditworthiness that does matter to most traders. They do not care to whom they are selling, as long as they get paid!

55.3 The leading case on mistake of identity is ***Cundy v. Lindsay* (1878) 3 App Cas 459 (HL),** which is odd because on the facts this looks like a case of mistake as to creditworthiness.

55.4 It is necessary to divide the cases into those where the contract was made by post (or otherwise remotely); and those where it was made face-to-face (*inter praesentes).* In the latter, there is a strong (but rebuttable) presumption that there cannot be a mistake as to identity because the victim of the fraud can see who he is dealing with, even if he thinks he is someone else. This rather supposes that identity is a matter of physical presence rather than names or personality. (Yes, I know this does not make any sense, but it gets worse!)

CONTRACTS MADE BY POST

55.5 ***Boulton v. Jones*** **(1857) 27 LJ Exch 117**

Jones ordered some leather hose from Brocklehurst with whom he had had regular dealings. Brocklehurst had recently transferred his business to Boulton, who fulfilled the order and then demanded payment. In fact, Jones had ordered the goods from Brocklehurst because he was owed money by him and had planned to set-off the debt against the payment. Boulton, as Brocklehurst's former foreman, must have realised this. HELD: The contract was void for mistake as to identity.

55.6 ***Cundy v. Lindsay*** **(1878) 3 App Cas 459 (HL)**

A rogue called Blenkarn sent a written order for handkerchiefs to Lindsay, a linen manufacturers in Belfast. He represented himself to be from the reputable firm of Blenkiron & Co. and, believing this, Lindsay sent him the handkerchiefs.
The rogue sold the handkerchiefs to Cundy, who bought them in good faith. Blenkarn did not pay for the handkerchiefs and Lindsay sued Cundy for unlawful conversion, claiming that title had not passed to Blenkiron as their contract was void for mistake. It was held that the contract was void for mistake as Lindsay never intended to deal with Blenkarn. The court likened the situation to one where Lindsay had made a contract with Blenkiron & Co. and the rogue had simply intercepted the goods.

"I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever." per Lord Cairns LC. at p.465

55.7 Would L. not have sold the handkerchiefs to B. if they thought he would pay, whoever he was? In ***Solle v. Butcher*** **[1950] 1 KB 671**, Denning L.J. considered that this case had been wrongly decided, and that the contract was really only voidable in equity. The House of Lords (he claimed) decided as they did simply to do justice to the seller since, at the time, they had no jurisdiction to make a finding based in equity. (See p.691) Has this theory been eradicated by ***Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.*** **[2003] QB 679**?

55.8 In ***King's Norton Metal v. Edridge, Merrett & Co.*** **(1897) 14 TLR 98 (CA)**, the Court of Appeal refined the principle in ***Cundy v. Lindsay*** by distinguishing between mistakes as to 'identity' and those as to 'attribute', holding that only the former mistake could be operative. In ***King's Norton Metal v. Edridge, Merrett & Co.,*** the rogue pretended to be someone who did not exist, so the victim could not reasonably claim to care about who he was: the concern was clearly only about whether he could pay for the goods he ordered.

55.9 ***King's Norton Metal v. Edridge, Merrett & Co.*** **(1897) 14 TLR 98 (CA)**

The plaintiffs received an order for wire supposedly from Hallam & Co. in Sheffield. The letter-head had a picture of a factory with several chimneys and a statement about various company depots. All this led the plaintiffs to believe that they were dealing with a creditworthy company, when, in fact, the letters were written by a fraudulent rogue called Wallis. Wallis sold the metal to the defendants without paying for it, and the plaintiffs sued in conversion. It was held that this was not a case of an operative mistake. They were not mistaking one person for another. They were simply mistaken as to the creditworthiness of the client.

CONTRACTS MADE *INTER PRAESENTES*

55.10 There is usually a presumption that when a contract is made in the presence of the other party (*inter praesentes*) then the mistake will be one of attribute rather than identity, since you are dealing with the person you can see, even if you think they are someone else.

55.11 ***Phillips v. Brooks Ltd.*** **[1919] 2 KB 243**

A rogue called North went into a jeweller's shop and selected pearls and a ring to the value of £3,000. He wrote out a cheque claiming to be Sir George Bullough, a well-known wealthy person. The jeweller checked his address in the directory, and accepted the cheque, allowing the rogue to take away the ring. When the cheque was dishonoured, the jeweller discovered that the ring had been pawned with the defendant, and claimed it back on the basis that the contract with North was void for mistake. It was held that the jeweller's mistake was only to the creditworthiness of his customer, not to his identity (even though he had used a false name.)

"Although he believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver the ring to the person who came into his shop...The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell." per Horridge J. at p.246/247

55.12 ***Phillips v. Brooks Ltd.*** only establishes a *presumption* that identity is not crucial. This presumption can be rebutted and has been rebutted in several cases, though not always on very convincing grounds.

55.13 ***Lake v. Simmons*** **[1927] AC 487 (HL)**

Esme Ellison, the mistress of wealthy Van der Borgh, told a jeweller that she was in fact Van der Borgh's wife. On this basis the jeweller let her have a pearl necklet on approval, entering in his books that her supposed husband was the purchaser. She later returned to the jeweller who let her take away another pearl necklet for Commander Digby who, she said, wanted it to give to her sister. In fact neither her sister nor Commander Digby existed! She then absconded with both necklets.(She had previously been sentenced to sixteen months hard labour for theft!)

In the insurance proceedings the question arose as to whether there was a contract of bailment with Esme Ellison; had the jeweller been mistaken as to her attributes (as someone for whom Van der Borgh would be liable) or to her identity (as the wife of Van de Borgh)? It was held that there was no contract.

"No doubt she got possession physically, but there was no mutual assent to any contract which would give her even the qualified proprietary right to hold it as bailee proper. The plaintiff thought he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The latter was entirely deceived as to the identity of the person with whom he was transacting. It was only on the footing and in the belief that she was Mrs. Van de Borgh that he was willing to deal with her at all... There was never any contract which could afterwards become voidable by reason of a false representation made in obtaining it, because there was no contract at all, nothing excepting the result of a trick practised on the jeweller."

per Lord Haldane at p.500

In reaching this conclusion, Viscount Haldane adopted the analysis of mistake as to identity given by the French jurist Robert Joseph Pothier (1699-1772) in his *Trait, des Obligations*: *"Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract,*

and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

On this basis, Viscount Haldane distinguished Phillips v. Brooks Ltd. from the present case, as there the contract was agreed before identity became an issue. It was only relevant to the method of payment. Thus, it came under the second of Pothier's examples.

55.14 ***Sowler v. Potter*** **[1940] 1 KB 271**

Mrs. Sowler let premises to Ann Potter for use as a tearoom. Ann Potter had previously been known as Ann Robinson, but had changed her name by deed poll. Under her previous name she had been convicted of permitting disorderly conduct in a tea-room. When Mrs. Sowler discovered this, she sought to have the lease declared void because of the fundamental mistake as to identity. The court upheld her claim. Following Lake v. Simmons, and distinguishing Phillips v. Brooks Ltd., the court stated: *"I think that this case of landlord and tenant is clearly a case where the consideration of the person with whom the contract was made is a vital element in the contract, and that, therefore, if there is any mistake with regard to the identity of the person with whom one is contracting, the contract is void ab initio."*

per Tucker J. at p.481

55.15 In ***Solle v. Butcher*** **[1950] 1 KB 671 (CA)** (above) Denning L.J. stated that the decision in ***Sowler v. Potter*** was incorrect because *"the doctrine of French law as enunciated by Pothier is no part of English law."* p.691.

He also dismissed the Pothier doctrine in ***Lewis v. Averay***, despite the House of Lords having adopted it in ***Lake v. Simmons***. ***Sowler v. Potter*** was also criticised by Dyson L.J. in ***Hudson v. Shogun Finance Ltd.*** [2002] QB 834 (CA) at para 34. However, look what has happened to ***Solle v. Butcher***!

15.16 The most perplexing – and notorious – case where ***Phillips v. Brooks Ltd*** was distinguished is…

Ingram v. Little **[1961] 1 QB 31 (CA)**

Three elderly sisters, Elsie Ingram, Hilda Ingram and Mary Badger, advertised their Renault Dauphine car for sale. A rogue called Hardy, claiming to be P.G.M. Hutchinson of Stanstead House, came to their house and offered to buy the car. They agreed a price of £717, but when he pulled out his cheque book, Elsie immediately told him they wanted cash. While they were discussing this, Hilda went to the post office to check his name and address in the phone directory. When she discovered it there, the sisters accepted the cheque. (In fact, the real P.G.M. Hutchinson had died some time earlier!) The rogue then sold the car to Reginald Little.

The Court of Appeal noted the difficulty for the Ingram sisters in dealing with the precedent of *Phillips v. Brooks Ltd*.:

"An apparent contract made orally inter praesentes raises particular difficulties. The offer is apparently addressed to the physical person present. Prima facie, he, by whatever name he is called, is the person to whom the offer is made. His physical presence identified by sight and hearing preponderates over vagaries of nomenclature...Yet clearly, though difficult, it is not impossible to rebut the prima facie presumption that the offer can be accepted by the person to whom it is physically addressed. To take two extreme instances: If a man orally commissions a portrait from some unknown artist who had deliberately passed himself off, whether by disguise or merely by verbal cosmetics, as a famous painter. The mistake in identity on such facts is clear and the nature of the contract makes it obvious that identity was of vital importance to the offeror.

"At the other end of the scale, if a shopkeeper sells goods in a normal cash transaction to a man who misrepresents himself as being some well-known figure, the transaction will normally be valid. For the shopkeeper was ready to sell goods for cash to the world at large and the particular identity of the purchaser in such a contract was not of sufficient importance to override the physical presence identified by sight and hearing." per Pearce L.J. at p.57

Despite this, the Court of Appeal felt able to rebut the presumption! It was held that the contract was void, and the sisters could recover their car from Little. Unlike in Phillips v. Brooks Ltd. the court said that there was no contract yet concluded at the time the parties started to discuss payment methods (!) and once the sisters had refused the cheque, the identity of the buyer became fundamental to the contract.

"The parties were no longer concerned with a cash sale of goods where the identity of the purchaser was prima facie unimportant. They were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance. She now realised that she was being asked to give him possession of the car on the faith of his cheque. This was an important stage of the transaction because it demonstrated quite clearly that she was not prepared to sell on credit to the mere physical man in her drawing room though he represented himself as a man of substance."

per Pearce L.J. at p.58

What is the real difference between *Ingram v. Little* and *Phillips v. Brooks*?

THE DENNING THEORY

55.17 Lord Denning considered that the presumption raised in ***Phillips v. Brooks_Ltd*.** was unassailable, despite the contrary House of Lords precedents, though in fact, he thought that there was no such thing as an operative mistake at all.

55.18 ***Lewis v. Averay*** **[1972] 1 QB 198 (CA)**

Keith Loder Lewis advertised his car for sale. A rogue claiming to be the actor Richard Greene offered to buy it and to pay by cheque.

Lewis asked for proof of his identity and was shown a forged pass to Pinewood Studios in the name of Richard Greene. Lewis let the rogue take the car, which he sold to Anthony Averay, a music student at the R.C.M.. Lewis claimed that the contract was void for mistake.

It was held, following ***Phillips v. Brooks Ltd***., that this contract was not void for mistake so Averay could keep the car. Lord Denning and Megaw L.J. thought that Ingram v. Little was incorrectly decided, and Lord Denning also thought that ***Lake v. Simmons*** was based on a wrong premise. Indeed, he said that a mistake as to identity could never be effective to make a contract void in law, but only voidable in equity. (See also his decision in ***Solle v. Butcher*** above.)

"What is the effect of this mistake? There are two cases in our books which cannot, to my mind, be reconciled the one with the other. One of them is Phillips v. Brooks Ltd., where a jeweller had a ring for sale. The other is Ingram v. Little, where two ladies had a car for sale... It seems to me that the material facts in each case are quite indistinguishable the one from the other...

"What is the effect of a mistake by one party as to the identity of the other? It has sometimes been said that if a party makes a mistake as to the identity of the person with whom he is contracting there is no contract, or, if there is a contract, it is a nullity and void, so that no property can pass under it. This has been supported by a reference to the French jurist Pothier; but I have said before, and I repeat now, his statement is no part of English law... Pothier's statement has given rise to such refinements that it is time it was dead and buried together...

"It has been suggested that a mistake as to the identity of a person is one thing: and a mistake as to his attributes is another. A mistake as to identity, it is said, avoids a contract: whereas a mistake as to attributes does not. But this is a distinction without a difference. A man's very name is one of his attributes. It is also a key to his identity. If then, he gives a false name, is it a mistake as to his identity or a mistake as to his attributes? These fine distinctions do no good to the law...
"When two parties have come to a contract -or rather what appears, on the face of it, to be a contract -- the fact that one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it." per Lord Denning M.R. at p.206/207

55.19 The Court of Appeal is not actually at liberty to depart from its own decisions in civil cases, let alone to overrule the House of Lords! Denning appeared to have done both.

THE RENAISSANCE OF CUNDY v. LINDSAY

55.20 ***Citibank NA v. Brown Shipley and Co. Ltd*. [1991] 2 All ER 690 (Commercial Court)**

A rogue, claiming to be Mr. George Economou of Economou Co. Ltd., phoned Mr. Trigg of Brown Shipley (a merchant bank) to ask if they could supply him with £150,000 worth of US dollars. They said they could do so on receipt of a banker's draft from Economou's bankers, Citibank. The rogue then phoned Citibank and asked them to prepare a draft for $US225,000, which they did. On December 23 1986, Mr. Burge of Citibank was asked to go downstairs and meet a messenger from Economou Co. Ltd. and to give him the draft. Mr. Burge did so, and in return received a letter on Economou & Co headed notepaper which purported to confirm the telephone instructions.
Following further phone calls, Mr. Burge was asked to exchange the dollar draft for a sterling draft for £154,532 which he did, and gave it to the same messenger. The messenger took the sterling draft to Brown Shipley and left it there, saying he would return to collect the cash in the morning (as the supposed George Economou had previously arranged.)

Trigg took the draft to Glitz, who, in accordance with his normal practice, rang up Citibank to check the authenticity of the draft. The next day, the messenger returned and the cash was handed to him in an envelope! The next day, the same fraud was pulled again, this time yielding a further $485,000. When the frauds were discovered, Citibank claimed the value of the banker's drafts from Brown Shipley on the basis that Brown Shipley had no right to cash them since the contracts with the rogue was void for fundamental mistake as to identity, and so no title had passed either to the rogue or to Brown Shipley.

HELD: Brown Shipley had acquired good title to the draft. The delivery of a banker's draft from an issuing bank to a receiving bank with the authority of the issuing bank, albeit the authority was induced by fraud, established a contract, albeit a voidable contract. The fact that delivery here was by means of a fraudster did not affect the formation of the contract because he was a mere conduit through whom title did not have to pass for there to be an effective contract and his identity was not of fundamental importance to the validity of the issuing bank's authority for the delivery of the draft to the receiving bank.

"The Cundy v. Lindsay principle only reaches the result of no title at least in a bilateral contract situation where the findings of fact are: (i) A thinks he has agreed with C because he believes B, with whom he is negotiating, is C; (ii) B is aware that A did not intend to make any agreement with him; and (iii) A has established that the identity of C was a matter of crucial importance." per Waller J. at p.699

THE FINAL DEMISE OF THE DENNING THEORY

55.21 ***Shogun Finance Ltd. v. Hudson* [2004] 1 AC 919 (HL)**

A rogue, pretending to be Durlabh Patel, bought a Mitsubishi Shogun car in a showroom in Leicester. He asked to buy it on hire purchase, so the dealer phoned Shogun Finance, the hire purchase company, and verified with them the rogue's details, relying on a stolen driving licence and a forged signature. The sale was confirmed and the rogue took the car. He then sold the car to Norman Hudson who bought it for £17,000 in good faith. Shogun sued Hudson for either a return of the car or its £18,364.52 value.

Under the Hire Purchase Act 1964, s.27, when a hire purchase debtor sells the goods in question to an innocent third party, that third party takes good title to the goods, even though they actually belonged to the Hire Purchase Company. Shogun argued that the rogue was not a hire purchase debtor as there had been no contract with him due to the unilateral mistake as to identity. He could not, therefore, pass good title to the innocent third party.

In the Court of Appeal, Sedley L.J. considered the cases in this area, quoting extensively and with admiration from Lord Denning's judgment in Lewis v. Averay [1972] 1 QB 198. However, he then conceded that: *"While (Lord Denning's) reasoning offers a principled basis (though not the only possible one) for the resolution of these recurrent cases, it can be seen that it omits any reference to Cundy v. Lindsay, a decision which is unhappily inconsistent with it but is binding on this court... In the result, Lewis v. Averay is authority for little except that the state of the law is still unclear."*

per Sedley L.J. at para 9

However, although conceding he was bound by *Cundy v. Lindsay*, Sedley L.J. held that this was an *inter praesentes* case since the dealer was acting on behalf of the finance company in ascertaining the buyer's creditworthiness. On that basis, *Phillips v. Brooks* would apply, the rogue was the 'debtor' under the Hire Purchase agreement and Hudson could keep the car.

The other two Court of Appeal judges and the majority of the House of Lords agreed that the principle in *Cundy v. Lindsay* was paramount, but unlike Sedley L.J. they did not consider that this was an *inter praesentes* contract of the type contemplated in *Phillips v. Brooks*.

The contract was the written document of Hire Purchase, and it was clearly fundamental to Shogun Finance that the party who signed the contract should be the person they claimed to be. Thus the deception WAS fundamental to the contract, the contract was VOID, and title had NOT passed to the rogue. Therefore Hudson had not gained title to the car and was obliged to return it.

"The approach and dicta of Lord Denning M.R. in Lewis v. Averay are misplaced and wrong. It has been suggested that the finance company was willing to do business with anyone, whatever their name. But this is not correct: it was only willing to do business with a person who had identified himself in the way required by the written document so as to enable it to check before it enters into any contractual or other relationship that he meets its credit requirements. Mr. Durlabh Patel was such an identified person and met its credit requirements so it was willing to do business with him. If the applicant had been, say, Mr. B Pastel of Ealing or Mr. G Patel of Edgbaston, it would not have been willing to do business with them if they could not be identified or did not meet with its credit requirements. Correctly identifying the customer making the offer is an essential precondition of the willingness of the finance company to deal with that person." per Lord Hobhouse at paras 47 & 48

55.22 Thus the doctrine of an operative unilateral mistake as to identity has been strongly reconfirmed.

VI: MISTAKES IN DOCUMENTS

56 RECTIFICATION

56.1 Where a contractual document contains an inaccuracy, the parties may apply for the equitable remedy of rectification. It must be clear either that both parties were agreed about the proper terms but just wrote them down incorrectly (a common mistake), or that one of the parties knew that there was a mistake in the contract, but was keeping quiet for his own benefit (a unilateral mistake).

56.2 If one of the parties meant one thing and the other party meant another (mutual mistake), the contract will not be rectified, though the mistake might lead to rescission of the whole contract if it is fundamental.

56.3 There are certain criteria to be satisfied before the remedy of rectification will be available:

1. The document in question must fail to express the common intentions of the parties. It must therefore be clear what the parties did intend. If this is ambiguous, the document cannot be rectified;

2. The party seeking to have the document rectified must adduce clear evidence that its terms do not accurately record the common intention of the parties when they made the contract. Otherwise, it would be possible for one party to attempt to rewrite a valid contract retrospectively;

3. The mistake must be one of drafting, not a mistake as to the transaction itself.

56.4 ***F.E. Rose (London) Ltd. v. W.H. Pim Jnr.. & Co. Ltd.*** **[1953] 2 QB 450 (CA)**

The plaintiffs were asked to supply buyers with 'Moroccan horsebeans described as feveroles'. The plaintiffs did not know what feveroles were, but were told by the defendants (their suppliers) that it was just another name for horsebeans. On this basis the plaintiffs entered a contract to buy 'horsebeans' from the defendants. In fact, feveroles are a superior form of horsebean, and when the buyers claimed damages from the plaintiffs (for supplying inferior horsebeans) the plaintiffs asked the court to rectify their contract with the defendants to read 'feveroles' instead of 'horsebeans', so they could sue them for supplying the wrong thing. The court refused to do so. The parties had agreed on a sale of horsebeans, and that is what the contract said.

"Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly.; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties-into their intentions-any more than you do in the formation of any other contract." per Lord Denning M.R. at p.461

56.5 ***A. Roberts and Co. Ltd. v. Leicestershire County Council*** **[1961] 1 Ch 555**

A construction company was employed to build Hinckley Burbage Secondary Modern School for the council over an 18-month period. By an error, the contract specified a 30-month period (for which the construction company would have demanded more money.) The council representative in charge knew that the company was working on the basis of an 18-month completion, but refused to amend the contract. The company applied to the court for rectification upon two alternative grounds, namely: (1) that it was the common intention of the parties that the contract should include a period for completion of 18 months and the 30 months was inserted under a common mistake; and (2) that the council knew of the company's intended period, but deliberately failed to draw attention to the inconsistent term in the contract (i.e. a unilateral mistake).

It was held that there was not a common mistake, as the parties were not in complete agreement as to the proper terms of the contract, but rectification would be allowed under the second submission.

56.6 A party is entitled to rectification if he proves beyond reasonable doubt (!) that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed that term to be included as originally agreed.

56.7 ***Riverlate Properties Ltd. v. Paul*** **[1975] 1 Ch (CA)**

The plaintiff company wished to sell a 99-year lease on a maisonette. Laura Paul agreed to buy the lease on the understanding that the lessor would be solely liable for exterior and structural repairs to the building. Clause 6 (a) provided that the lessor would be so liable, and clauses (b), (c) and (d) referred to the lessor's liability for the insurance, exterior decoration and water rates. Under clause 5 the lessee covenanted to pay half of the reasonable costs incurred under clause 6 (b), (c) and (d), but, by mistake, the lessor omitted to make the lessee liable under clause 6 (a). The lessor sought inter alia to have this rectified. The Court of Appeal refused the rectification. Since the lessee neither directly nor through her solicitor knew of the lessor's mistake and since she was not guilty of sharp practice, there was no justification for rectification either on the ground of a common mistake or on the ground of knowledge on the lessee's side that the lessor was making a mistake at the time of the execution of the lease.

57 NON EST FACTUM (It is not my deed)

57.1 As a general rule, once someone has signed a document he is presumed to have read and understand it even if he cannot read. However, in exceptional circumstances, a person who signs a document whilst mistaken as to its contents may escape its consequences by pleading *'non est factum'* - 'it is not my deed'. It is essential that the signatory should not have been negligent in signing the document.

57.2 ***Foster v. Mackinnon*** **(1869) LR 4 CP 704**

Mackinnon, who was 'a gentleman far advanced in years' was tricked into signing a bill of exchange for £3,000 having been assured that it was a guarantee form. It was held that he was not bound by the document, which he had signed without negligence.

"It was as if he had written his name. in a lady's album, or on an order for admission to the Temple Church, or in the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange, on the other side of the paper." per Byles J. at p.712

57.3 ***Lewis v. Clay*** **(1898) 67 LJQB 224**

Lord William Nevill asked the defendant to witness his signature on some deeds for him by signing in four places. The defendant could not read the deeds as they were covered in blotting paper, Lord William explaining that the contents were private. In fact the papers were promissory notes to the value of £11,000 made out in favour of the plaintiff who took them in good faith and for value. It was held that although the defendant had misplaced his confidence, he was not negligent and was not liable on the promissory notes.

57.4 The limitations of the doctrine were explained in the leading case of ***Gallie v. Lee*** **[1971] AC 1004.**

Saunders v. Anglia Building Society: Gallie v. Lee **[1971] AC 1004 (HL)**

A widow of 78 signed a document which she believed was a deed of gift of her house to her nephew to enable him to raise money on the house. In fact it was an assignment of the house to her nephew's business associate Lee for £3,000. Lee mortgaged the property and when he defaulted on the payments, the building society sought possession of the house. The widow asked for the assignment to be declared void on the basis that she did not know what she was signing - *"Non est factum".* It was held that the assignment must stand. In order for the plea to succeed, two things must be proved:

i) That there is a radical difference between what the person signed and what he thought he was signing (which was not the case here);

ii) That the signer took all reasonable precautions and was not negligent in signing (whereas the widow here had signed the document without reading it as she had broken her spectacles). This will most usually apply to someone who is illiterate or disabled.

"I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy." per Lord Reid at p.1016[29]

57.5 ***Avon Finance Co. Ltd. v. Bridger*** **[1985] 2 All ER 281 (CA)**

A son tricked his elderly parents into signing a legal charge on their house to secure a loan to him of £3,500. The parents thought they were signing a mortgage document. HELD: The parents could not rely on the defence of *non est factum* as they had not exercised reasonable care in the circumstances. However, the transaction would be set aside in equity.

[29] ***Saunders v. Anglia Building Society*** was applied in Ireland in ***Allied Irish Bank plc v. Higgins*** **[2011] ECC 30**

"Here this son brought undue pressures on his parents for the benefit of the plaintiffs, and for himself of course, because he wanted the loan. They left it all to him. They said that he was to procure the execution of the deed. He brought undue pressure to bear on his parents by giving them an entirely misleading account of the documents. It seems to me that the parents' bargaining power was impaired by their own ignorance, and that this court should not uphold the transaction."

per Lord Denning M.R. at p.286

57.6 ***Norwich and Peterborough Building Society v. Steed (No.2)*** **[1993] 1 All ER 330 (CA)**

The owner of a freehold house permitted his mother, sister and brother-in-law to live in the house whilst he was living in the United States. The sister and her husband persuaded the owner to give the mother his power of attorney and then tricked the mother into signing a deed transferring the house to them.

They mortgaged the house, and when they defaulted on the payments, the building society claimed possession. The owner claimed that the mother's transfer was not valid as she had not known of her power of attorney so she did not know what she was signing. This plea of *non est factum* failed *inter alia* because the owner's failure to inform his mother of her appointment showed such a want of care as to preclude him from relying on her ignorance of the power.

The Court of Appeal also emphasised that the plea will be more difficult to establish where an innocent third party has been affected by the fraud.

"Where a fraudster has tricked, first, the signer of the document, in order to induce the signature, and then some third party, who is induced to rely on the signed document, which of the two victims is the law to prefer. The authorities indicate that the answer is, almost invariably, the latter. The signer of the document has, by signing, enabled the fraud to be carried out, enabled the false document to go into circulation." per Scott L.J. at p.125

57.7 Although *non est factum* is obviously of very limited application, it has sometimes been upheld as a defence.

Lloyds Bank plc v. Waterhouse **[1991] Fam Law 23 (CA)**

A father was asked to act as a guarantor when a bank agreed to lend his son a sum of money to buy a farm. The father was illiterate, but he did ask the bank's representatives to explain the guarantee to him before he signed it. The father believed that the guarantee covered only the loan for the farm, but in fact it was the bank's standard from of guarantee which covered all the son's debts to the bank. When he was called upon to guarantee his son's general debts, the father pleaded *non est factum*.

HELD: The defence succeeded. In order to establish a defence of non est factum, the defendant had to show that he was under a disability, that the document he signed was fundamentally different from what he thought he was signing and that he took the precautions he ought to have taken to ascertain its nature and extent. This had been established.

There was no duty on the father to reveal that he was illiterate, having satisfied himself that the extent of his liability was acceptable.

However, the Court of Appeal, without suggesting that the father was not entitled to rely on the plea, stated that it should be narrowly confined, and preferred to determine the merits of the case against the bank on grounds of the negligent misrepresentation by which they had misled the father as to the contents of the document.

PART FOUR: LIQUIDATED DAMAGES

58 THE OLD LAW

58.1 If a contract provides for a fixed sum to be paid on breach, the courts will traditionally assess whether this is a 'genuine pre-estimate of the loss' likely to be sustained by the breach (a 'liquidated damages clause') or whether it is, in fact, a sum out of proportion to the anticipated loss (a 'penalty clause') designed to punish the other party if they do not perform the contract.

58.2 If it is deemed to be a liquidated damages clause, it will be upheld, even though the actual loss is not equal to the stipulated sum. If it is deemed to be a penalty clause, it will be invalid, and damages will be assessed as unliquidated.

58.3 The test for whether or not a clause of this kind is penal has been extensively reviewed recently by the Supreme Court in ***Cavendish Square Holding BV v. Makdessi*** **[2015] 3 WLR 1373 (SC).**

58.4 Prior to ***Cavendish Square Holding BV v. Makdessi***, the leading case on liquidated damages/ penalty clauses was ***Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*** **[1915] AC 79**.

Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. **[1915] AC 79 (HL)**

Dunlop supplied motor tyres and covers to dealers on the terms that they were not to sell them to customers at less than the current list prices. The contract provided for damages of £5 for each and every tyre sold in breach of the agreement. The dealers breached this term, and claimed that the requirement to pay £5 per tyre was an illegal penalty clause.

HELD: It was not a penalty, and the dealers were therefore obliged to pay. Lord Dunedin set out the following criteria for determining whether a clause was a genuine liquidated damages clause or an illegal penalty clause:

"1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages...

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage...

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach...

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach...

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a greater sum than the sum which ought to have been paid...

(c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." per Lord Dunedin at p.86

58.5 The case has been applied many times, as in, for example:

***Bridge v. Campbell Discount Co. Ltd.* [1962] 1 All ER 385 (HL)**

A clause in a car hire-purchase agreement provided that, if the agreement were terminated, the hirer should deliver up the vehicle and pay to the owners all arrears of hire rent due plus a sum equal to two-thirds of the hire-purchase price. This was held to be a penalty, and the hirers were only entitled to a sum representing their actual loss.

59 THE NEW LAW

59.1 In ***Cavendish Square Holding BV v. Makdessi***, the Supreme Court held that the test for whether a liquidated damages clause is penal is whether it is designed to punish the defendant rather than reasonably to protect the commercial interests of the claimant: i.e. it does **not** rest on whether it is a genuine pre-estimate of financial loss (though that is likely to be a useful indicator). Thus, a figure which cannot be justified in terms of anticipated financial loss might still be valid if it acts as a reasonable deterrent to a breach.

59.2 ***Cavendish Square Holding BV v. Makdessi* [2015] 3 WLR 1373 (SC)**

Two very different cases were heard together by the Supreme Court to determine the criteria for when a liquidated damages clause will be void as an illegal penalty clause.

In the first case – ***Cavendish Square Holding BV v. Makdessi*** – following extensive arm's-length negotiations involving teams of lawyers, the defendant agreed to sell to the claimant a controlling interest in an advertising company. The price was $147 million to be paid in instalments, which included a substantial sum for the goodwill of the company. In the contract, the defendant agreed not to set up in competition with his old company, with the proviso that if he did so, he would not be entitled to any further payment instalments and the claimant would have an option to buy all the remaining shares at a price which disregarded the goodwill. When the defendant breached the non-competition clause, the claimant sought a declaration from the court that it could enforce the non-payment and option clauses.

The Court of Appeal held that these clauses were penal as they were not a genuine pre-estimate of the loss, but the Supreme Court overturned this decision. Although the clauses had no relationship to the likely financial loss to be suffered in a breach, that was not the issue. The question was whether they were a reasonable commercial deterrent to prevent a breach which would be disastrous to the claimant's interests – which they were. It was relevant that the contract was drafted between parties of equal strength, both properly advised by their legal teams, as this would raise a strong presumption that the parties themselves were the best judges of what was legitimate by way of a deterrent clause.

In the second case **– *ParkingEye (sic.) Ltd. v. Beavis*** – the defendant parked his car in a shopping centre car-park managed by ParkingEye. There was a prominent notice in the car-park which stated that the maximum stay was two hours, and that failure to comply would incur a charge of £85. Beavis stayed for two hours 56 minutes and was sent a bill for £85, with the proviso that this would be reduced to £50 if paid within 21 days. He refused to pay and was sued.

His case was taken up by the Consumers' Association, who claimed *inter alia* that the £85 was an unlawful penalty. Although £85 was clearly not a pre-estimate of financial loss (especially as normal parking was free), the majority of the Supreme Court held that this was not an unlawful penalty. The claimant had a legitimate interest in ensuring the efficient use of the car-park for other users of the shopping centre, including deterring users from staying for long periods. The charge – which was clearly

signed – was not an unreasonable amount for achieving that purpose, especially by comparison with the overstay charges in local authority car-parks.

"In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. In Legione v. Hateley (1983) 152 CLR 406, 445, Mason and Deane JJ defined a penalty as follows: "A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation …" All definition is treacherous as applied to such a protean concept. This one can fairly be said to be too wide in the sense that it appears to be apt to cover many provisions which would not be penalties (for example most, if not all, forfeiture clauses). However, in so far as it refers to "punishment" and "an additional or different liability" as opposed to "in terrorem" and "genuine pre-estimate of loss", this definition seems to us to get closer to the concept of a penalty than any other definition we have seen. The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.

"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity." per Lord Neuberger, at paras 31 and 32

59.3 Liquidated damages may be set at a level which turns out to be less than the actual loss. In that case, the party in breach only has to pay the amount set out in the contract.

59.4 ***Cellulose Acetate Silk Company Ltd. v. Widnes Foundry (1925) Ltd.*** **[1933] AC 20 (HL)**

A contract for the delivery and erection of plant provided that the contractors were to pay £20 for every week they were late. The contractors were 30 weeks late, but the actual loss caused by this was £5,850. HELD: They only had to pay in accordance with the liquidated damages clause (i.e. £600)

59.5 ***Giraud UK Ltd. v. Smith*** **(2000) (Unreported) (EAT)**

Smith was employed as a driver by Giraud. His contract contained a clause that if he resigned without giving proper notice, he would forgo the equivalent of four weeks pay. It did not, however, preclude the employer from claiming more if the actual loss suffered was greater. Smith did resign without notice, and the company deducted the amount from his pay. Smith claimed that this was an unlawful penalty. HELD: Although there was no reason why an employment contract should not contain a lawful liquidated damages clause, this was a penalty clause. As it did not prevent the employer from taking further action, it could not have been a genuine pre-estimate of loss.

PART FIVE: UNLIQUIDATED DAMAGES

I: TYPES OF UNLIQUIDATED DAMAGES

60 DEFINITIONS

60.1 In the absence of a valid liquidated damages clause, the courts will assess contractual damages themselves as 'unliquidated', based on a set of criteria which have developed through centuries of common law and which are often contradictory. The essence of contractual damages is that they should be compensatory i.e., they should compensate the claimant for his loss, rather than penalise the defendant for his breach, though in practice they may do both or neither.

60.2 If a claimant wins the case but has actually suffered no loss, he will usually be awarded 'NOMINAL DAMAGES' – that is, a small symbolic amount to indicate his victory, though he might well find that it was not cost-effective to bring the case as he may have to pay some or all of the costs.

60.3 An award that represents an actual financial loss is called 'SUBSTANTIAL DAMAGES', even though the amount awarded might not be 'substantial' in the normal sense of the word. This chapter is concerned with the criteria for the award of substantial, unliquidated damages.

60.4 A common way of categorising the heads of damage is as follows[30]:

1. **EXPECTATION LOSS:** This means awarding the amount of money that the claimant would have expected to receive had the contract been performed. This is the key criterion to the award of damages, but its application contains myriad contradictions. In particular, it is not settled whether the damages should protect the claimant's performance interest – by giving him the funds to enable him to have the contract performed – or only his economic expectation – by putting him in the same financial position as he would have anticipated. These two are not necessarily the same thing (as we shall see).

2. **RELIANCE LOSS:** This usually refers to the loss suffered by the claimant in financing the contract (e.g., in making preparations). There is some debate about whether this should include money spent before the contract was made, and money lost through opportunities wasted whilst involved with a now defunct contract.

3. **RESTITUTIONARY LOSS:** Sometimes called 'disgorgement' damages, this concerns not the claimant's loss, but rather the defendant's gain. A defendant might deliberately breach a contract to get a better profit elsewhere. Should the thwarted claimant be entitled to some or all of those profits as a disincentive to wayward defendants and sharp practice, or is it just a question of business?

4. **NON-FINANCIAL LOSS:** This concerns an award for the claimant's distress, disappointment or lack of amenity, and has been a matter of some controversy, largely caused by Lord Denning!

[30] This categorisation owes much to a celebrated article by Lon Fuller and William Perdue from Yale University. However, it has also been criticised as being inadequate to explain court practice.

See Fuller, L. and Perdue, W.: "The Reliance Interest in Contract Damages" (1936-37) 46 Yale Law Journal 52 (Part 1) & 373 (Part 2); and Bunbury, A. "Quantification of Contractual Damages: Have we moved on from Fuller and Perdue?" H.L.J. 2014, 13, 1-31.

II: EXPECTATION LOSS – CAUSATION AND REMOTENESS

61 THE RULE IN *ROBINSON v. HARMAN*

61.1 The classic statement of what is now known as the 'expectation rule' comes from Baron Parke in Robinson v. Harman, and has been endorsed many times in the highest courts.

***Robinson v. Harman* (1848) 1 Ex. 850**

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." per Parke B. at 855

***British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] AC 673 (HL)**

"He who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach."

per Viscount Haldane L.C. at p.689

***The Golden Strait Corpn. v. Nippon Yusen Kubishika Kaisha: The Golden Victoria* [2007] 2 AC 353**

"The fundamental principle governing the quantum of damages for breach of contract is long established and not in dispute. The damages should compensate the victim of the breach for the loss of his contractual bargain. The principle was succinctly stated by Parke B in Robinson v. Harman and remains as valid now as it was then." per Lord Scott at para 29

61.2 The corollary of the principle is that an award of damages for breach of contract should not put the claimant in a better position than he would have been had the contract not been breached.

***Sally Wertheim v Chicoutimi Pulp Company* [1911] A.C. 301 (Privy Council: Canada)**

The appellants purchased 3,000 tons of moist wood pulp from the respondent. On the contractual delivery date, the wood pulp had a market value of 70s. a ton, but it was delivered late, by which time it had a market value of only 42s 6d. The appellants therefore claimed the difference of 27s 6d per ton. However, they had managed to resell the pulp for 65s per ton. The Privy Council held that they were only entitled to 5s per ton, as that was their actual financial loss.

"Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position." per Lord Atkinson at p.308

61.3 However, there are several reasons to question the efficacy of the Rule in ***Robinson v. Harman,*** and the victims of a breach often find themselves worse off financially even after an award of substantial damages.

61.4 ***Ruxley Electronics and Construction Ltd. v. Forsyth*** **[1996] AC 344 (HL)**

"(The Rule in Robinson v. Harman) does not mean that in every case of breach of contract the plaintiff can obtain the monetary equivalent of specific performance. It is first necessary to ascertain the loss the plaintiff has in fact suffered by reason of the breach. If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. For the object of damages is always to compensate the plaintiff, not to punish the defendant." per Lord Lloyd at p.365

61.5 ***Attorney General v. Blake*** **[2001] 1 AC 268 (HL)**

"Leaving aside the anomalous exception of punitive damages, damages are compensatory. That is axiomatic. It is equally well established that an award of damages, assessed by reference to financial loss, is not always "adequate" as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate." per Lord Nicholls at p.282

61.6 In particular, the rule in ***Robinson v. Harman*** is compromised by the requirement that the claimant establish both CAUSATION and REMOTENESS.

61.7 To succeed in a claim for damages, the claimant must, of course prove that the loss complained of was factually caused by the defendant's breach, but that is not enough.

61.8 The rule in ***Robinson v. Harman*** is considered to be too harsh without some qualification, and the courts have devised rules to prevent claims for injuries which are thought to be too 'remote', even though technically a result of the breach

62 CAUSATION

62.1 The test of whether a breach has 'caused' a loss is a common-sense one, not one based on the 'chaos theory.

62.2 ***Chaplin v. Hicks*** **[1911] 2 KB 786 (CA)**

"It is impossible in many cases to regard the damage that has followed the breach as that for which the plaintiff is to be compensated, for the injury to the plaintiff may depend on matters which have nothing to do with the defendant. For example, an innkeeper furnishes a chaise to a son to drive to his dying father; the chaise breaks down; the son arrives too late to see his father, who has cut him out of his will in his disappointment at his not coming to see him; in such a case it is obvious that the actual damage to the plaintiff has nothing to do with the contract to supply the chaise... Damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous."

per Fletcher Moulton L.J. at. p.794

62.3 ***Monarch Steamship Co v. Karlshamns Oljefabriker (A/B)*** **[1949] AC 196 (HL)**

A British ship was chartered to carry a cargo of 8,200 tons of soya beans from Manchuria to Karlshamn, in Sweden. Owing to a delay caused by the vessels unseaworthiness, she did not reach Karlshamn before the outbreak of World War II, when the British Admiralty prohibited her from proceeding there, and ordered the cargo to be discharged in Glasgow. The owners of the beans then had the expense of chartering neutral ships to deliver the beans to Karlshamn. The shipowners claimed that, although in breach, they had not caused the expensive diversion as this was the result of the war and the subsequent orders of the Admiralty. HELD: The owners were liable. The effective cause which brought the Admiralty orders into operation was the delay in the voyage caused by the vessel's unseaworthiness and thus the delay in carrying out the contract of carriage was attributable to the owner's default. In the international situation, they should have foreseen that war might break out and cause diversion of the vessel.

Lord Wright pointed out, however, that there must be a proper causal link between a breach of contract and the damage complained of:

"It is well established that unseaworthiness, if it is to be a relevant factor of liability, must be 'a cause' of the damage or loss. That is necessary because unseaworthiness might take many different forms in the same vessel, so that before any one form can be relied upon, it must be a cause of damage; for instance, the failure to carry a proper medical chest, if it is a breach of the warranty, might have no relevance to the loss of a vessel by perils of the sea." per Lord Wright at p.226

62.4 It is no defence to say that, although you caused the damage, another party was equally to blame.

62.5 ***Heskell v. Continental Express Ltd.*** **[1950] 1 All ER 1033**

Heskell agreed to sell three bales of poplin to a Persian buyer. He instructed C.E. Ltd., who were warehousing the goods, to pack and dispatch them. C.E. negligently failed to do this, and in ignorance of the fact, Heskell applied for a bill of lading from Strick Line Ltd., the loading brokers. Strick negligently issued the bill of lading, even though they had not received the goods, and Heskell duly billed the Persian buyer, who paid. When the goods were not received, Heskell had to pay £1,319 [£30,266] damages to the Persian buyer. He sued C.E. Ltd. for their failure to dispatch the goods. They claimed that they were not the sole cause of the damage as it was also due to Strick's negligence.

HELD: C.E. Ltd.'s default was an equal cause to Strick's, and was sufficient by itself to carry judgment for full damages.

"If a breach of contract is one of two causes, both co-operating and both of equal efficacy... it is sufficient to carry a judgment for damages." per Devlin J. at p.1048

62.6 ***Supershield Ltd. v. Siemens Building Technologies FE Ltd.*** **[2010] 1 C.L.C. 241 (CA)**

Supershield was a subcontractor in a contract to install a sprinkler system in a London office block. S. installed faulty float valves in the water tank in the basement of the building so that it overflowed. This would not have mattered as there were drains to cope with any overflow, except that these were blocked by packaging. A damaging flood ensued. S claimed that it was not liable for the flood damage *inter alia* because it would not have happened but for the blocked drains. HELD: The faulty valves were an operative cause of the flood, and S was liable.

"The distinctive feature of the present case is that the ball valve and the drains were both designed to control the flow of water involved in the operation of the sprinkler system. None of the cases cited to us had any comparable feature (i.e., simultaneous failure of separate protection measures) and, surprisingly as it may seem, counsel were not able to find any. It is not uncommon in the case of a sophisticated engineering project (whether an aircraft, a car, a tunnel or a building) for the designer to incorporate multiple safety devices in the reasonable expectation that the risk of simultaneous failure of both or all the protection devices will be minimal. But the fulfilment of that expectation will depend on those responsible for the protection devices doing as they ought. If those responsible fail to do so, and the unlikely happens, it should be no answer for one of them to say that the occurrence was unlikely, when it was that party's responsibility to see that it did not occur.

"As Mr Lord observed, the reason for having a number of precautionary measures is for them to serve as a mutual back up, and it would be a perverse result if the greater the number of precautionary measures, the less the legal remedy available to the victim in the case of multiple failures."

per Toulson L.J. at para 44

62.7 Where loss results partly from the breach and partly from the criminal act of a third party, the party in breach may still be liable for the loss, if the third party's act was "foreseeable", but not otherwise. (cf. the position in tort)

62.8 ***De la Bere v. Pearson Ltd.*** **[1908] 1 KB 280**

The defendants, who owned a newspaper called M.A.P. advertised that their city editor would give readers financial advice. Baghot de la Bere (using the pseudonym 'Rex'), wrote to ask for the name of a good stockbroker. The city editor, recommended the services of Thomson who traded as an outside broker under the name H. Hughes. (An 'outside broker' is someone who transacts Stock Exchange business, but is not a member of the Stock Exchange.) Thompson was, in fact, an undischarged bankrupt, a fact which was unknown to the editor, but which he could have found out easily had he made enquiries. De la Bere sent £1,400 for investment to Thompson, who immediately misappropriated it. De la Bere sued the newspaper for his money.

HELD: There was a contract between Baghot de la Bere and Pearson Ltd. by which the newspaper owners undertook to use reasonable care that the person recommended as a broker should answer the description of a good stockbroker. The city editor, in recommending the outside broker without making reasonable enquiries about him, had committed a breach of that contract, and the defendants were liable for the loss thereby caused to the plaintiff, even if the misappropriation of the money by the broker amounted to a criminal offence.

62.9 ***Stansbie v. Troman*** **[1948] 2 KB 48 (CA)**

A painter who, in breach of contract, left his client's house empty and unlocked whilst he went out to buy some wallpaper, was liable for the value of goods stolen from it by thieves. Tucker L.J. cited with approval the county court judgment:

"It seems clear that the negligence of the decorator was not the direct cause of the householder's loss. The direct cause was the crime of the thief. The decorator was no party to the crime, which was a thing that he never intended. On the other hand, the main purpose of the latch is to keep out thieves, so far as the latch will serve. If the latch be fastened back, the house really needs watching; and therefore the negligence of the decorator really consisted in failure to take reasonable care to guard against the very thing that happened. Forcing a door or breaking a window takes time and may attract attention. The decorator's negligence increased the problematic risk of the theft; and the risk matured into a certainty."

per Tucker L.J. at p.51

62.10 On the other hand, if the loss would have occurred despite the breach of contract, then there can be no claim for substantial damages. This can be a matter of some controversy.

Peter Lingham and Company v. Lonnkvist **[2000] Lloyd's Rep. PN 885 CA**

Karl Lonnkvist bought a butcher's shop from Cossey. In order to do so he employed Peter Lingham to help secure him a loan from the Royal Bank of Scotland. In breach of contract, PL overstated the value of the business to the bank, and KL secured the loan. When the business failed, KL claimed that had it not been for PL's breach of contract, he might not have got the loan and so would not have been able to buy the business; or, if PL had informed him of the true value of the business, he might not have wanted to buy it anyway. PL, he claimed, was therefore liable to him for the business losses suffered.

HELD: There was no actionable causal link between PL's contractual negligence and KL's business failure. PL had no contractual duty to warn KL about the true value of the business or to put him off buying it. He was employed to secure him a loan, and this he had done, albeit via a technical breach of contract.

"This issue, whether it is treated as one of causation or one of remoteness, seems to me to turn on the first principles illustrated by the decisions of this court in Galoo Ltd. v. Bright Grahame Murray [1994] 1 WLR 1360 and Swindle v. Harrison [1997] 4 All ER 705.

"The first confirms that the mere acceptance of a loan cannot amount to a loss causing damage. It confirms, too, that it is not enough that a breach of contract has given the opportunity for a loss to be sustained: the breach must be the dominant or effective cause of the loss if it is to sound in damages. The second case, looking at the same issue (so to speak) from the opposite direction, confirms that loss, if proved, must be shown to have been caused by the defendant's breach of duty."

per Sir Anthony Evans at para.66

63 CAUSATION AND LACK OF MITIGATION BY THE CLAIMANT

63.1 The defendant might argue that although he caused the original loss, he is not liable for the knock-on effect of the breach if that was caused by the failure of the claimant himself to mitigate the loss. Thus, if a ship is not ready to take a perishable cargo, the cargo owner should not refuse a reasonable alternative if the refusal would compound the loss.

63.2 This is known as the **Rule in *British Westinghouse*.**[31]

***British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] AC 673 (HL)**

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." per Viscount Haldane L.C. at p.689

63.3 ***Woodlands Oak Ltd. v. Conwell* [2011] B.L.R. 365**

W was contracted to carry out building works on C's property. When the work proved to be defective, C sued W for the cost of remedial work. However, the damages awarded did not include the cost of remedying certain snagging items (i.e., items which needed attention, but which were not sufficiently significant to delay practical completion), because C had not notified W of them, and had thereby denied W the opportunity of fixing them at no cost to C. This was considered to be a failure by C to mitigate their loss.

63.4 There is some debate as to whether the claimant technically has a 'duty to mitigate' (as Viscount Haldane states) or whether it is just that lack of mitigation might affect causation, but it amounts to the same thing.

63.5 ***Payzu Ltd. v. Saunders* [1919] 2 KB 581 (CA)**

A contract for the sale of goods by the defendants to the plaintiffs provided that delivery should be in instalments, with each instalment paid for within one month of delivery. The buyers failed to pay for the first instalment when due, and the sellers, wrongly believing that the failure to pay was due to lack of means, declined to make further deliveries unless the buyers agreed to pay cash with their orders. The buyers refused to accept delivery on those terms. It was held that the seller was in breach of contract, but the buyers should have mitigated their loss by accepting the seller's offer of delivery against cash payment. The damages recoverable were not the difference between the market price (which had risen) and the contract price, but only such loss as the buyers would have suffered if they had accepted the new offer - i.e. the interest it would have lost over the period of pre-payment.

"Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take all reasonable steps to mitigate the loss consequent on the breach." per Scrutton L.J. at p.589

63.6 However, the defendant cannot successfully claim a lack of mitigation to reduce the damages unless the claimant has acted unreasonably.

[31] There is another rule also known as the **Rule in British Westinghouse** relating to the duty of a claimant to account for any profit made from the breach by the defendant.

63.7 ***British Westinghouse Co. Ltd. v. Underground Electric Railways Co of London Ltd.*** **[1912] AC 673**

"The principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business." per Viscount Haldane at p.689

63.8 ***Lodge Holes Colliery Company v. Wednesbury Corporation [1908] AC 323*** **(HL)**

"Now I think a Court of Justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. When a road is let down or land let down, those entitled to have it repaired find themselves saddled with a business which they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably. In judging whether they have acted reasonably, I think a Court should be very indulgent and always bear in mind who was to blame." per Lord Loreburn LC at p.325

63.9 Several cases have illustrated how difficult it might be for a defendant to establish a lack of reasonable mitigation.

63.10 ***Borealis AB v. Geogas Trading SA*** **[2011] 1 Lloyd's Rep. 482 (QBD Commercial Court)**

Borealis claimed damages from Geogas in respect of the supply by G to B of butane feedstock which was contaminated with fluorides. The butane was discharged from a carrying vessel into an underground cavern at B's plant in Sweden. As discharge took place, feedstock from the cavern was fed to the cracking furnaces at the plant. Shortly after discharge of the goods into the cavern had commenced, a pH meter indicated that pH in the discharge from the distillate drum had dropped from its target level. The low pH condition persisted for more than two days but B took no action in response to that alarm. B's claim was that the fluorides had produced hydrofluoric acid which had caused serious and extensive physical damage to the plant and equipment.

G admitted that it was in breach of an implied term of satisfactory quality in the sale contract, but claimed that B had failed to react appropriately, or at all, to the pH alarm and its acts or omissions following the alarm had broken the chain of causation; alternatively, G was not liable for avoidable losses flowing from a failure to mitigate.

HELD: Borealis was wholly unaware that the goods with which it had been supplied were contaminated with fluorides. Nor was there any reason why B ought to have been aware that the goods might have been so contaminated. The essential purpose of the pH alarm was to protect downstream carbon steel plant and equipment from corroding weak acids naturally occurring in the product stream. The alarm was not designed or intended to deal with an unexpected contaminant in the feed such as hydrofluoric acid. The drop in pH levels indicated acid in the system but not what type of acid. In all the circumstances, B's response to the alarm, although well short of best practice, was not unreasonable. Thus, there was no break in the chain of causation and no failure to mitigate.

63.11 ***Trebor Bassett Holdings Ltd. v. ADT Fire and Security plc*** **[2011] BLR 661 (QBD Technology and Construction Court)**

The claimants (TB) claimed damages for breach of contract from ADT following a fire at their factory. The claimants made popcorn and other confectionery. In the popcorn production area of their factory, corn was popped in pans of oil before being transported via an elevator to a hopper for packaging. TB contracted with ADT, a supplier of fire suppression systems, for the design and installation of an automatic "CO2 suppression" system in the elevator and the hopper.

TB had chosen not to install sprinklers; there was no "fire segregation" around the popcorn production area; and very few of M's employees knew how to activate the system manually in the event of it failing to activate automatically.

Despite ADT's system having been installed, a fire broke out in the hopper. Burning popcorn fell to the floor and although staff tried to stamp out the flames, the fire spread, destroying the whole factory. TB began proceedings for breach of contract, claiming £110 million for the loss of the factory. ADT claimed, *inter alia*, that they were not liable for this as the chain of causation had been broken by TB's failure to take reasonable action to put the fire out themselves.

HELD: *Inter alia*, that ADT's breach of contract caused the fire and they were therefore liable for the cost of rebuilding the popcorn production area. Although TB's defaults in respect of the absence of segregation and sprinklers were serious and had a significant causal effect, they did not break the chain of causation when the fire moved on to destroy the rest of the factory. While they were a concurrent cause of the losses beyond the popcorn production area, they did not become the single true cause of those losses.

n.b. Damages were reduced by 75% for contributory negligence.

64 REMOTENESS: THE RULE IN *HADLEY v. BAXENDALE*[32]

64.1 Even where there is a proven causal link between the breach and the loss, policy and justice demand that it is not every loss, however remote, for which the defendant can be made liable.

64.2 ***Hadley v. Baxendale*** **(1854) 9 Exch 341** is the classic case in which Baron Alderson laid down the two-limb test for remoteness of contractual damages.

Hadley v. Baxendale **(1854) 9 Exch 341**

Hadley owned a mill in Gloucester, of which their only crankshaft had broken. A firm in Greenwich agreed to make a replacement on receipt of the old one. H contracted with Baxendale to deliver it there the following day, but they actually took a week. As H did not have a spare, the mill was stopped for a week and so they lost a week's profits, which they claimed from B. It was held that they should not succeed in this claim. Damages are only payable for such losses as may fairly and reasonably be expected either to arise naturally from the breach, or to be in the contemplation of both parties at the time they made the contract, as a probable result. The stoppage may have been anticipated by the plaintiffs, but was not by the defendants. If they had been told of this likelihood, they would probably have attempted to limit their liability.

"Now we think the proper rule in such a case as the present is this:- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

"Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damage resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated.

"But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." per Alderson B.

[32] The remoteness rule is generally known as "The Rule in *Hadley v. Baxendale*", even though it has been refined by later cases, particularly *Koufos v. C. Czarnikow Ltd.: The Heron II* [1969] 1 AC 350 (HL)

64.3 ***Banco de Portugal v. Waterlow and Sons*** **[1932] AC 452**

A firm of printers employed by the Bank of Portugal to print a series of bank notes known as Vasco da Gama 500-escudo notes delivered to the Bank 600,000 notes which were put into circulation in Portugal. Subsequently, in breach of their contract of employment, the printers delivered to one Marang, the head of a band of criminals, 580,000 notes of the same type, printed from the original plates or from plates made from the same die, in the belief that he had the authority of the Bank. Marang and his associates introduced these false notes into Portugal and put a large number of them into circulation. The Bank on discovering that unauthorized notes were in circulation issued notices withdrawing the whole of this issue of Vasco da Gama notes and undertaking to exchange all notes of this type presented to the Bank for other notes.

In an action by the Bank against the printers for breach of contract the defendants maintained that the loss suffered by the Bank was due to their own voluntary action in paying the unauthorized notes and that this was not something the defendants could reasonably have contemplated as a probable result of their breach.

The House of Lords disagreed with the printers, holding that the losses suffered by the Bank fell clearly within the rule in ***Hadley v. Baxendale***.

"The first question is: "Was this loss one which could reasonably be supposed to have been in contemplation by both parties at the time of the making of the contract as the probable result of the breach?" This rule has often been criticized on the ground that people when they make contracts do not contemplate their breach. Be that as it may, I have come to the conclusion that Greer L.J. was right in taking the view that it would be naturally in the usual course of things, and would be within the contemplation of the parties

(1.) that in circumstances like those which happened in the present case, the Bank would be compelled for their own protection to issue a public notice informing the holders of their notes that the only notes of which forgeries had been discovered were the Vasco da Gama issue; and

(2.) that they would also be compelled in the interest of their own credit and currency to act reasonably in the matter, and

(3.) that it would be reasonable to exchange any of those forged notes which were presented for payment for valid notes of an equal value. Once this is found, as it has in my view been rightly found in this case, that the Bank acted reasonably, and it is also found that Messrs. Waterlow committed a breach of contract, the resulting consequences from such reasonable action must be damages which the Bank are entitled to receive in respect of breach of contract, because they are damages fairly and reasonably to be considered as arising naturally - i.e., occurring in the usual course of things from such breach of contract - as the probable result of the breach." per Viscount Sankey L.C. at p.475

65 REMOTENESS
VICTORIA LAUNDRY: CLARIFICATION OR CONFUSION?

65.1 In ***Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*** **[1949]** Asquith L.J. famously attempted to explain the **'Rule in *Hadley v. Baxendale*'**

65.2 ***Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*** **[1949] 2 KB 528 (CA)**

The defendants contracted to sell a boiler to the plaintiffs, which they knew was required for immediate use. Delivery was made five months late. The plaintiffs lost not only the £16 a week profit that they could have made from normal customers, but also a special £262 a week dyeing contract with the Ministry of Supply. In referring the matter to the official referee, the Court of Appeal emphasised that only that loss which was reasonably foreseeable under the rule in *Hadley v. Baxendale* could be recovered.

"What propositions applicable to the present case emerge from the authorities as a whole? ... We think they include the following:
(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed.... This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2) In cases of breach of contract the aggrieved party is only entitled to receive such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough... if the loss is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy."

per Asquith L.J. at p.539

66 REMOTENESS
THE HERON II: CLARITY OR CONFUSION?

66.1 The two-part test was extensively analysed in *The Heron II* [1969]

***Koufos v. C. Czarnikow Ltd. (The Heron II)* [1969] 1 AC 350 (HL)**

K were ship owners who contracted to carry a cargo of sugar to Basrah for C. They knew C was a sugar merchant, and that there was a sugar market in Basrah, but they did not know that C intended to sell the sugar as soon as the ship arrived. The ship was 9 days late, and during the delay the price of sugar plummeted. C sold the sugar for £4,000 [£44,100] less than it would have done, and claimed the loss of profit from K. It was held that C was entitled to its £4,000 from K. Even though the ship owner did not know of the intention to sell the sugar immediately, "if he had thought about the matter he must have realised at least that it was not unlikely that the sugar would be sold in the market at market price on arrival."

Considering the judgment of Asquith L.J. in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.,* Lord Reid made the following observations:

"What is said to create a 'landmark' is the statement of principles by Asquith L.J. This does to some extent go beyond the older authorities and in so far as it does, I do not agree with it. In paragraph (2) it is said that the plaintiff is entitled to recover "such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach." To bring in reasonable foreseeability appears to me to be confusing measure of damages in contract with measure of damages in tort. A great many extremely unlikely results are reasonably foreseeable: it is true that Lord Asquith may have meant foreseeable as a likely result, and if that is all he meant I would not object further than to say that I think that the phrase is liable to be misunderstood. For the same reason I would take exception to the phrase "liable to result" in paragraph (5). Liable is a very vague word but I think that one would usually say that when a person foresees a very improbable result he foresees that it is liable to happen.

"I agree with the first half of paragraph (6). For the best part of a century it has not been required that the defendant could have foreseen that a breach of contract must necessarily result in the loss which has occurred. But I cannot agree with the second half of that paragraph. It has never been held to be sufficient in contract that the loss was foreseeable as "a serious possibility" or "a real danger" or as being "on the cards." It is on the cards that one can win £100,000 or more for a stake of a few pence - several people have done that. And anyone who backs a hundred to one chance regards a win as a serious possibility - many people have won on such a chance... It appears to me that in the ordinary use of language there is a wide gulf between saying that some event is not unlikely or quite likely to happen and saying merely that it is a serious possibility, a real danger, or on the cards." per Lord Reid at p.389

Thus, according to Lord Reid, a defendant is liable for such loss as a reasonable man, knowing what the defendant knew or ought to have known, would consider "not unlikely" to result. This is not as low a degree of probability as "reasonable foreseeability" in tort, nor as high as "reasonably certain."
However, the other Lords adopted different wording, some in direct opposition to Lord Reid:

Lord Morris: *"the result was liable to be or at least the result was not unlikely to be..."*
Lord Hodson: *"the result was liable to be..."*
Lord Pearce and Lord Upjohn: *"there was a serious possibility or a real danger..."*

67 REMOTENESS *JACKSON v. RBS*: PUTTING SEMANTICS TO REST?

67.1 The issue of language may now be entirely academic since the decision in *Jackson v. Royal Bank of Scotland* [2005] 1 WLR 377.

***Jackson v. Royal Bank of Scotland* [2005] 1 WLR 377 (HL)**

Jackson imported dog chews from Thailand, which he sold to an English company. In breach of contract, Jackson's bank accidentally sent a letter to the English company revealing that Jackson was making a 19% mark-up on each transaction. The English company therefore terminated its contract with Jackson and started buying directly from the Thai supplier.

Jackson claimed an award from the bank for loss of business.

The High Court awarded damages based on four more years trading on a decreasing scale, after which the court said potential earnings were too speculative.

The Court of Appeal held that damages should be limited to just one year.

Jackson appealed that there should be no limit on its losses. The bank cross appealed that the loss was not within its reasonable contemplation at all.

The House of Lords restored the judgment of the High Court. One year was too arbitrary as a time limit on the damages, but it was likely that as the years progressed, that the English company would have been motivated to increase its profits and so to press Jackson for a better price and eventually to end the relationship entirely, even without the breach of contract by the bank.

However, the House of Lords in specifically applying ***Hadley v. Baxendale*** simply adopted the wording of Baron Alderson. It made no reference at all to the controversy raised by ***The Heron II***. It would seem safe, therefore, to look for 'probable' or even 'reasonably foreseeable' losses to satisfy the test.

67.2 Furthermore, in ***Transfield Shipping Inc. v. Mercator Shipping Inc.: The Achilleas* [2009],** in which all the major authorities are discussed, the House of Lords seem interchangeably to use the expressions 'reasonably foreseeable', 'probable' and 'likely to result'.

68 *THE ACHILLEAS* REFINEMENT

68.1 In ***The Achilleas*,** the House of Lords rejected a claim for damages even though it appeared to meet the requirements of the second limb of ***Hadley v. Baxendale*.** The reasons given differed between the judges. Two said this was because the specific loss was not, in fact, a probable result of the breach; but two said it was because in some cases there was an extra requirement of proof on the claimant – that the defendant can be shown to have 'assumed responsibility' for the losses. The fifth judge (Lord Walker) seemed to base his judgment on both theories.

68.2 There has been some academic debate about the actual *ratio* of this case, but the following principles seem to have developed:

1. The basic test of remoteness remains that of ***Hadley v. Baxendale*,** and in most cases no further test is needed. If the defendant knew of the probable risks of his breach, he may be assumed to have accepted responsibility for them.

2. In exceptional cases, the claimant must specifically show that the defendant objectively 'assumed responsibility' for the losses caused by the breach. This will be the case where the facts suggest otherwise, despite the loss being foreseeable as being probable. Examples are where there is a contrary trade practice or where the liability resulting from the breach would be unquantifiable, unpredictable, uncontrollable or disproportionate.

68.3 ***Transfield Shipping Inc. v. Mercator Shipping Inc.: The Achilleas*** **[2009] 1 AC 61 (HL)**

The owners of The Achilleas, a single-decker bulk carrier, chartered the vessel to the charterers with redelivery due on May 2 2004. In April 2004, the owners fixed a follow-on time charter with another company at the new higher market rate of $39,500 per day. However, the charters voyage was delayed, and by May 5, the owners realised that the vessel would not be returned in time for them to pass it on the new charterers. They therefore had to negotiate a new start for the second charter, but because the market had dropped, they could only get $31,500 per day.

They claimed their loss of profit on the second charter from the first charterers. The first charterers denied liability beyond the period of late delivery on the basis that they had not been put on notice of the existence of the follow-on charter. The arbitrator, judge and Court of Appeal all held that, despite the general understanding in the shipping market that a charterer who returned a vessel late was only liable for the period of late delivery, the loss from the follow-on charter was one which arose naturally from the breach as a not unlikely consequence of it, and was therefore recoverable under the first head of *Hadley v. Baxendale*.

The House of Lords overturned this decision. Although the loss caused by the volatile market might have been foreseeable in the wide sense, this was not a risk that the charterer of a ship would have impliedly undertaken and it would not objectively be reasonable therefore to impose it upon him unless it was expressed in the contract that it should be so. This was especially the case here because normal trade practice was to limit damages in such cases to the period of late delivery.

"12 It seems to me logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not reasonably be considered to have undertaken.

13 The view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price paid. Anyone asked to assume a large and unpredictable risk will require some premium in exchange. A rule of law which imposes liability upon a party for a risk which he reasonably thought was excluded gives the other party something for nothing. And as Willes J said in British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship (1868) LR 3 CP 499, 508: "I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for."

14 In their submissions to the House, the owners said that the "starting point" was that damages were designed to put the innocent party, so far as it is possible, in the position as if the contract had been performed: see Robinson v Harman (1848) 1 Exch 850, 855.

However, in Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd (sub nom South Australia Asset Management Corpn v York Montague Ltd) [1997] AC 191 , 211, I said (with the concurrence of the other members of the House): "I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages."

15 In other words, one must first decide whether the loss for which compensation is sought is of a "kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility." ….

24 The findings of the majority arbitrators shows that they considered their decision to be contrary to what would have been the expectations of the parties, but dictated by the rules in Hadley v Baxendale as explained in The Heron II [1969] 1 AC 350 . But in my opinion these rules are not so inflexible; they are intended to give effect to the presumed intentions of the parties and not to contradict them.

25 The owners submit that the question of whether the damage is too remote is a question of fact on which the arbitrators have found in their favour. It is true that the question of whether the damage was foreseeable is a question of fact: see Monarch Steamship Co Ltd v. Karlshamns Oljefabriker (A/B) [1949] AC 196 . But the question of whether a given type of loss is one for which a party assumed contractual

responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law.

26 The owners say that the parties are entirely at liberty to insert an express term excluding consequential loss if they want to do so. Some standard forms of charter do. I suppose it can be said of many disputes over interpretation, especially over implied terms, that the parties could have used express words or at any rate expressed themselves more clearly than they have done. But, as I have indicated, the implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of essentially the same techniques of interpretation. In both cases, the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for. It cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language. In my opinion, the findings of the arbitrators and the commercial background to the agreement are sufficient to make it clear that the charterer cannot reasonably be regarded as having assumed the risk of the owner's loss of profit on the following charter. I would therefore allow the appeal." per Lord Hoffman

68.4 In the recent case of ***Wellesley Partners LLP v. Withers LLP*** **[2015] EWCA Civ 1146,** Floyd L.J. gave a useful summary of the various speeches in ***The Achilleas***.

68.5 ***Wellesley Partners LLP v. Withers LLP*** **[2015] EWCA Civ 1146**

A solicitors' firm negligently drafted a partnership agreement in such a way as to cause massive loss to its client, a headhunting firm. Instead of giving an investor the option to withdraw AFTER 42 months, the agreement gave the investor the chance to withdraw WITHIN that time period. The investor accordingly withdrew its funds, which prevented the headhunting firm from opening a potentially highly lucrative US office.

The Court of Appeal held, *inter alia*, that the loss to the client was within the reasonable contemplation of the solicitors, and that they were accordingly liable for the loss, notwithstanding the special rule in *The Achilleas.*

"69 The rule which controls what damage is recoverable in contract has been reviewed and analysed in many decisions since Hadley v Baxendale (1854) 9 E. 341. The rule was restated by the Court of Appeal in Victoria Laundry , re-examined by the House of Lords in The Heron II [1969] 1 AC 350 and most recently considered by the House in The Achilleas . It remains the basic rule that a contract breaker is liable for damage resulting from his breach if, at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. The principle is founded on the notion that the parties, in the absence of special provision in the contract, would normally expect a contract breaker to be assuming responsibility for damage which would reasonably be contemplated to result from a breach. The Achilleas shows that there may be cases where, based on the individual circumstances surrounding the making of the contract, this assumed expectation is not well founded. Thus, in that case, charterers of a ship were not liable for all the consequences of a late redelivery of the vessel, which had forced the owners to renegotiate a more favourable rate for a follow-on charter. The commercial pressure to renegotiate had arisen because of unusually and highly volatile market rates. According to Lord Hoffmann (see paragraph 23), with whom Lord Hope agreed, departure from the ordinary test was justified because the loss claimed would have been completely unquantifiable at the date of the contract and because the general understanding of the market was that the claimed loss was not recoverable. The charterer could not reasonably be taken to have assumed responsibility for the particular loss claimed. Lord Hoffman recognised that the mere fact that losses were unforeseeably large did not exclude recovery if loss of that type would fall within one or other of the rules in Hadley v Baxendale (see paragraph 21). Nevertheless, there was also what he called an "exclusive principle" which meant that there could be some foreseeable losses for which the contract breaker would not be liable because they were not the kind or type of loss for which he can be treated as having assumed responsibility. Whether a type of loss was different is determined by asking whether it reflects what would reasonably have been regarded as significant for the purpose of the risk being undertaken (paragraph 22).

"Lord Hoffmann did, however, point out that: "…cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual, but limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets, such as banking and shipping are likely to be more common".

"70 Lord Rodger, with whom Lady Hale agreed, felt able to bring the case within the traditional remoteness rule, holding that the loss in question stemmed from an unusual occurrence of which the charterers were unaware and could not have been foreseen as being likely to arise out of the delay in question. He felt it unnecessary to deal with questions of assumption of responsibility in those circumstances (see paragraphs 60 and 63).

"71 The speech of Lord Walker contains passages which appear to approve the "assumption of responsibility" approach of Lord Hoffman and Lord Hope: see for example his approval of the proposition that foreseeability itself is not a satisfactory test at paragraph 79. At paragraph 87, however, he allies himself in addition with the reasoning of Lord Rodger. I have not found it necessary to delve further into the question of whether this means that the true ratio of the decision is that given by Lord Hoffmann or Lord Rodger, or whether there are two inconsistent ratios." per Floyd L.J.

69 REMOTENESS: POST-ACHILLES CASES

69.1 ***The Achilleas*** has had something of a mixed judicial reception. Although it has been applied in some cases with entirely different fact situations, in other cases (including similar shipping cases) it has been emphatically distinguished, or not even alluded to. The general consensus is that it is, at least, of a very limited application.

69.2 ***Supershield Ltd. v. Siemens Building Technologies FE Ltd.*** **[2010] 1 C.L.C. 241 (CA)**

"Hadley v Baxendale remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e., that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, South Australia and Transfield Shipping are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties. In those two instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances." per Toulson L.J. at para 43

1. Cases where The Achilleas has been followed or applied

69.3 ***Donoghue v. Greater Glasgow Health Board*** **[2009] CSOH 115 (Scottish Court of Session)**

Jacqueline Donoghue, a blood porter at Glasgow Royal Infirmary, was injured when she fell down some concrete stairs at the hospital. The stairs had been made slippery because of gravel walked in from a new gravel path at the hospital installed by a car parking company, IPL. In fact, IPL were in breach of contract with the Health Board for making the path of gravel rather than the required asphalt, so when Donoghue sued the Health Board under the Occupiers' Liability (Scotland) Act 1960, the Health Board sued IPL for breach of contract.

Following ***The Achilleas***, the court held that the issue was whether IPL could reasonably be regarded as having assumed the risk of third-party liability for personal injuries caused by the breach. The answer was – no they could not.

69.4 ***Supershield Ltd. v. Siemens Building Technologies FE Ltd.*** **[2010] 1 C.L.C. 241 (CA)**

"Hadley v Baxendale remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e., that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, South Australia and Transfield Shipping are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties. In those two instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances." per Toulson L.J. at para 43

69.5 ***Pindell Ltd. v. Airasia BHD*** **[2011] 2 All ER (Comm) 396**

The claimant lessors of an aircraft claimed damages from the lessee in respect of a lost sale of the aircraft caused by late redelivery.

One of the many issues arising in this case was whether the claimants needed to establish that the defendants had assumed responsibility for such a loss, as per *The Achilleas*, or whether it was sufficient to show merely that the *Hadley v. Baxendale* test had been satisfied.

Whilst holding that the decision in *The Achilleas* had not effected any major change to the approach to be adopted to the recoverability of damages for breach of contract (para 84), Tomlinson J. nevertheless followed the decision in that case in holding that the loss of the follow-on sale was too remote to be claimable even under normal *Hadley v. Baxendale* principles. He held that it would be surprising if the loss of a sale was in principle recoverable, particularly in a case such as this one where the aircraft which on redelivery was over 20 years old. Furthermore, the evidence demonstrated that late redelivery of aircraft was common, and it was obvious that the older the aircraft the more likely it was that unforeseen problems would delay delivery. In the great multitude of aircraft leases, particularly of elderly aircraft, the loss of a sale or follow-on lease would not ordinarily occur in consequence of late redelivery from the lease.

"I have…concluded that the loss suffered in this case was not the ordinary consequence of late redelivery but was rather caused by the extremely volatile market conditions in 2008. It was those conditions which meant that Pindell could not, as the parties would otherwise have expected, conclude in the market a substitute sale on terms broadly similar to that which they had lost. It is I believe axiomatic that such losses are irrecoverable, as expressly held by Lord Rodger, Lord Walker and Baroness Hale in The Achilleas." per Tomlinson J. at para 88

69.6 ***Scott v. Kennedys Law LLP*** **[2011] EWHC 3808 (Ch)**

Hugh and Linda Scott bought a guesthouse called "Windy Ridge" in Kent from John Hawkins. The house was attached to a newly built property called "Turners View". Hawkins intended to continue to live in Turners View. The Scotts had employed a solicitor – Richard Featherstone – to advise them in the purchase, but the solicitor failed to notice that for legal purposes, the two houses were treated as one, and that 'dual occupancy' was in breach of the planning conditions for Turners View. The Scotts therefore had to sell Windy Ridge back to Hawkins so that the whole estate would be back in single occupation.

The Scotts claimed damages from the solicitors' firm for: Capital loss on the sale of the business (£139,000); wasted capital expenditure (£73,000); the cost of maintaining the business (£322,000); other expenses and capital losses (£520,000).

Whilst not doubting that the Scotts could claim their lost investment in the business as arising naturally from the breach, the judge was not so willing to award them damages for their ongoing losses after the sale of Windy Lodge, which he considered to be specific to the personal position of the Scotts. These

included: the rent the Scotts had to pay on other accommodation to house them and their four adult children after they moved out; and the cost of postponing a holiday to the Seychelles because they needed to deal with the move.

Applying the principles in *Hadley v. Baxendale* and *The Achilleas*, the judge held that the solicitor could neither be taken to have seen these losses as probable, nor to have assumed responsibility for them.

"I have already drawn attention to the lack of evidence as to what Mr Featherstone knew about the Scotts' overall financial position. He obviously knew that they were borrowing money, but how much by way of investments they may or may not have had, there was no evidence about. There was also no evidence that he knew about their family commitments and life objectives, so I conclude that losses occasioned by the future lifestyle choices made by the Scotts cannot be within the contemplation of the solicitor and the Scotts at the time they made the contract as the "probable result" of a breach of it.

"Even if I were wrong about that, I have considered also, alongside the remoteness test, whether these losses are of a kind, even if not too remote, that are recoverable for a breach of this kind. It seems to me that they are not. The solicitor here undertook responsibility for providing the right information about the planning position affecting Windy Ridge. That would naturally mean that if he gave wrong information, the Scotts would suffer losses relating to being trapped in a blighted property, perhaps for many years.

"It is hard to see, however, how the living expenses after the property was sold could have been reasonably "regarded by the contracting party as significant for the purposes of the risk he was undertaking", to use Lord Hoffmann's words. To put the matter shortly, I do not think that a solicitor advising on such a transaction, considering the extent of the liability he was undertaking, would consider that he was assuming responsibility for the clients' living expenses for an unquantified and open-ended period after the property itself was long gone. Again, in the words of Lord Hoffmann in Transfield: "such a risk would be completely unquantifiable … they would have no idea when that would be done or what its length… would be."

"It is, therefore, for these two reasons that I do not consider that any of the Scotts' ongoing losses after the sale of Windy Ridge are recoverable." per Vos J. at paras 80-83

2. Cases where The Achilleas has been distinguished

69.7 ***ASM Shipping Ltd. of India v. TTMI Ltd. of England (The Amer Energy)*** **[2009] 1 Lloyd's Rep. 293**

A vessel owner applied for permission to appeal against an award made against him by an arbitrator, on the grounds that the award was made on the basis of the old pre-Achilleas rule rather than the new one. The court refused his application *inter alia* on the basis that the House of Lords had not intended to lay down a new rule, and that the law as it stood had been properly applied to the applicant's case.

69.8 ***Sylvia Shipping Co. Ltd. v. Progress Bulk Carriers Ltd. (The Sylvia)*** **[2010] 2 Lloyd's R 81**

The owners of a single deck bulk carrier (called 'Sylvia') chartered the vessel to PBC for 11/13 months in charterers' option at a hire rate of USD 5,900 per day.

The charterers entered into a sub-voyage charter with a company called Conagra to carry a cargo of wheat from Baie Comeau (in Canada) to Casablanca at a rate of about $34,000 per day for 24 days. Due to a breach of the maintenance term in the contract by the owners (Sylvia Shipping), the Canadian authorities detained the vessel as the steel work within the cargo holds was wasted, and were unfit for holding grain and grain products. The repairs took two weeks, in which time Conagra cancelled the sub-charter.

PBC were able to get another sub-charterer after the repairs, but the market had dropped, and they could only get $22,340 per day. PBC claimed both the loss of profits during the repair period and also the difference in the charter rate for the second charter.

Sylvia Shipping claimed that, following *The Achilleas*, they were not liable for the loss of profits due to the dip in charter rates because they could not be taken to have assumed responsibility for a volatile

market. The Court rejected this argument and found for PBC. Hamblen J. held that the 'assumption of responsibility' issue was only relevant in rare cases where it was clear that, despite satisfying the *Hadley v. Baxendale* test, the defendant could not reasonably be supposed to have accepted the known risk. In particular, he held that the instant case could be distinguished from The Achilleas for two reasons:

"Unlike in The Achilleas, there is no finding of a general market understanding or expectation that damages for delay during the currency of a time charterparty are limited to the difference between charter and market rates during the period of delay. On the contrary…the general understanding is that damages can be recovered for loss of a fixture in such circumstances. Moreover, the measure of damages recoverable for a lost voyage fixture is a well-recognised measure of damages in charterparty cases.

"Similarly, unlike in The Achilleas, this is not a case in which it can be said that the resulting liability is likely to be unquantifiable, unpredictable, uncontrollable or disproportionate. Where a follow on fixture is made at the end of a charter it could be for any period. It is entirely possible that it could be a long term charter lasting years even though the charter breached is for a relatively short term. It is the unpredictable and unquantifiable element introduced by the various possible lengths of follow on charter that makes the potential liability disproportionate and commercially unacceptable. By contrast, loss of a sub-charter during the currency of a time charter can never be for a longer period than the time charter itself. Further, very often, as here, it will be for the loss of the specific charter voyage for which the vessel was fixed. Loss of a voyage fixture within the course of a charterparty will result in a loss within reasonable and fixed confines. It is possible that market movements may mean it is a large loss, but it will be a loss based on a trading voyage." per Hamblen J. at paras 72 and 73

69.9 ***John Grimes Partnership Limited v. Gubbins*** **[2013] P.N.L.R. 17 (CA)**

Mr..Gubbins, a Cornish farmer, wished to develop certain land for housing and for that purpose to build a road on it which was to be adopted by the local authority. The construction and adoption of the road, and with it the completion of the development, were conditional on approval of the road design by the authority. Gubbins engaged the appellant consulting engineers JGP Ltd to produce a suitable design, it being a term of the contract that the work was to be complete by March 2007. It was not completed on time: in April 2008 G engaged another engineer, who obtained approval in June that year.

The sale of the houses built on the land was delayed as a result of JGP's failure to produce the design when promised. G alleged that property values had substantially dropped in the intervening period, and that as a consequence the price obtained by him for the development had been reduced by a six-figure sum or more. To JGP's action for the residue of their fees of £15,000, he counterclaimed for damages reflecting this reduction, and for the return of monies already paid to JGP. JGP argued, inter alia, that the loss claimed by G was too remote and/or was not a loss for which they should be regarded as having accepted liability. The judge held JGP liable on the counterclaim, and they appealed.

Held: The judge had properly held that the loss suffered by G had been reasonably foreseeable. Presumptively, where loss was foreseeable as a result of a breach of contract, that loss was recoverable, it being the normal inference that the contract-breaker should be regarded as having accepted responsibility for it. It was always open to a contract-breaker to show that in the particular circumstances such an inference should not be drawn, but such situations were the exception and not the rule. Despite the fact that JGP faced liability that might be disproportionate to its fee, there was no reason why the present case should not be decided according to the normal rule, and *The Achilleas* should be distinguished.

"This appeal raises an issue of some importance about the law on the remoteness of damage in cases of breach of contract. Can a developer of land, whose development scheme is delayed in its implementation by the failure of a consulting engineer to perform tasks which he has contracted to perform by an agreed date, recover damages for the loss he suffers thereby from a diminution in the market value of the development which occurs during the period for which its completion is delayed?"

"It seems to me to be right to bear in mind, as Lord Hoffmann emphasised in The Achilleas that one is dealing with the law of contract, where the situation is governed by what has been agreed between the parties. If there is no express term dealing with what types of losses a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term to determine the answer.

Normally, there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken. But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability. Such was the case in The Achilleas .

"How does that approach affect the outcome of the present appeal? There seems little doubt that the Judge here sought to apply those principles. He considered whether losses arising from movement in the property market were reasonably foreseeable at the time of contract as a consequence of delay by Mr Swainson, and he concluded that they were. Indeed, he found that Mr Swainson actually knew that the property market could go up or down and knew what Mr Gubbins intended to do by way of development and when: see para.185 of his judgment, set out at para.10 ante. But he did not stop there. Instead, he went on to consider whether this was one of those unusual cases which fell outside the more common Hadley v Baxendale approach. He expressly applied his mind to the commercial background of the contract and to whether the standard approach would not reflect "the expectation or intention reasonably to be imputed to the parties".: para.193, set out at para.11 ante. It seems to me that the Judge's approach to and summary of the legal principles cannot be faulted. The appellant contends that the judge did not properly apply those principles. Yet it is beyond dispute that there was no evidence put before him to show that there was some general understanding or expectation in the property world that a party in this engineer's position would not be taken to have assumed responsibility for losses arising from movement in the property market where there had been delay in breach of contract. In that sense it was patently not an The Achilleas type case."

per Tomlinson L.J.at paras 1, 24-26[33]

3. Cases where The Achilleas has been referenced

69.10 ***Lansat Shipping Co. Ltd. v. Glencore Grain BV (The Paragon)*** **[2009] EWCA Civ 855**

Lansat had let its vessel to the respondent charterer, Glencore, on a time charter, on the New York Produce Exchange form with additions and amendments, "for about minimum 3 to about 5 months (about means +/- 15 days)". The last voyage under the charter took 77 days, and the vessel was redelivered 6.166 days late. Glencore paid hire at the charter rate for the duration of the charter up until the last date for redelivery and at the market rate for the six days the vessel was overdue.

Lansat claimed further hire under cl.101 of the charter, which provided that if the last voyage exceeded the maximum period under the charter and the market rate of hire exceeded the charter rate, the charter rate would be adjusted to reflect the market rate from the 30th day prior to the last date for redelivery. Lansat's claim amounted to a sum of US$471,603.32 over and above what Glencore had already paid.

Glencore disputed Lansat's claim on the basis that the term requiring the additional sum was an illegal penalty clause as it was not a genuine pre-estimate of loss since the 30 days in question were already covered by the main contractual rate and had the ship been redelivered within that time, there would be no additional loss at all. Lansat contended that as the final voyage was an illegitimate last order, G had thereby been asking Lansat to perform a *non-contractual* voyage or service outside the charterparty, and Glencore was therefore liable to pay not the charterparty hire but a market rate outside the contract.

HELD: Whether the last voyage was legitimate *or* illegitimate, as the owners had permitted it, it was made within the terms of the original contract. The term regarding payment at an increased market rate for hire during the period which was within the terms of the contract was indeed a penalty and therefore void.

Lord Clarke MR cited the decision in *The Achilleas*, but only for confirmation the usual principles regarding late delivery.

[33] see also ***Wellesley Partners LLP v. Withers LLP*** **[2015] EWCA Civ 1146** above.

"The three cases to which I have referred, The Dione, The Peonia and The Black Falcon, provide a consistent body of judicial opinion all to the same effect. As the judge observed at [14], Steyn J's conclusion was cited by Rix LJ without disapproval in this court in The Achilleas at para 41. The Achilleas was a case in which the question was whether the owners could recover damages for the loss of a following fixture. In the House of Lords in that case, Lord Hoffmann stated the principle in the same way as follows at [23]: 'If it was clear to the owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it. What this shows is that the purpose of the provision for timely redelivery in the charterparty is to enable the ship to be at the full disposal of the owner from the redelivery date*. If the orders are accepted and the last voyage overruns, the owner is entitled to be paid for the overrun at the market rate. All this is well known to the parties."*

per Lord Clarke MR at para 14

70 REMOTENESS: DENNING AND THE PIGS

70.1 A quirky variation on these principles was offered by Lord Denning.

***H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co Ltd*. [1978] 1 QB 791 (CA)**

There was a contract for the supply and installation at a pig-farm of a large storage hopper to hold pignuts. Owing to the negligence of the supplier the ventilation cowl, sealed during transit to the farm, was left closed. The pig food went mouldy, and 254 young pigs contracted E. coli (a very rare disease at the time) from which they died. The pig farmer claimed damages for (i) the value of the dead pigs (£10,000) and (ii) the loss of profits from selling the pigs when mated (about £26,000). The defendants offered them £18!

Swanwick J held that the illness of the pigs was to be expected as a natural consequence of the breach. Since illness was to be expected, death (though not a normal consequence) was not too remote, and so the value of the dead pigs could be recovered, as well as the value of loss of sales and turnover.

The Court of Appeal upheld the first claim (value of the dead pigs), but for divergent reasons. Lord Denning said that physical damage (rather than pure financial loss) required a lesser degree of possibility than the Heron II test, whilst the other judges thought that the death of the pigs was a "serious possibility", and so satisfied the Heron II test anyway. The second claim was also upheld. Lord Denning seems to have dissented on this point, but the other two judges, who allowed the full amount of damages, said that they agreed with his award!

Lord Denning's Judgment

Lord Denning drew a distinction between loss of profit cases (such as the Heron II) and physical damages cases. He said that the Heron II test only applied to loss of profit cases. Where there was actual physical damage, the test would be one of "reasonable foreseeability", as in tort.

"(In loss of profit cases) the defaulting party is only liable for the consequences if they are such as, at the time of the contract, he ought reasonably to have contemplated as a serious possibility or real danger...

"In the physical injury or expense case, the defaulting party is liable for any loss or expense which he ought reasonably to have foreseen at the time of the breach as a possible consequence, even if it was only a slight possibility...

"The makers are liable for the loss of the pigs that died and the expenses of the vet and such like, but not for loss of profit on future sales or future opportunities of gain." per Lord Denning M.R. at p.802/803

Orr and Scarman L.JJ.'s Judgments

Orr and Scarman L.JJ. said that they agreed with the decision of Lord Denning, but not with his reasoning. They did not think that there was a distinction between loss of profits and physical damage, and that the test for either was the "serious possibility" test of the Heron II, which was satisfied in this case.

Even though E. coli was not specifically contemplated, it was the natural result of feeding toxic food to pigs that they would become sick and maybe die, and thus the type of harm which had been caused by the breach was a "serious possibility".

"It does not matter, in my judgment, if they thought that the chance of physical injury, loss of profit, loss of market, or other loss as the case may be, was slight, or that the odds were against it, provided they contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued upon breach." per Scarman L.J. at p.813

Perplexingly, Scarman L.J. also suggested that the remoteness tests in contract and tort are the same, despite a clear statement from Lord Reid in the Heron II that they are not! The contradictions within this case have led some academics to question its value!

III: EXPECTATION LOSS – PERFORMANCE INTEREST v DIFFERENCE IN VALUE

71 GENERAL PRINCIPLES: COST OF CURE v. DIFFERENCE IN VALUE

71.1 At the most basic level, damages will be calculated by a simple equation of deducting what the claimant actually made from what he should have made, given the available market. This will be his 'loss of bargain' or his lost expectation of making a profit.

71.2 An example of this may be seen in ***Aercap Partners 1 Ltd. v. Avia Asset Management AS*** **[2010] 2 CLC 578 (QBD Comm)**

AerCap Partners 1 Ltd. v. Avia Asset Management AS **[2010] 2 CLC 578 (QBD Comm)**

The claimants agreed to sell two aircraft to the defendants for US$15.4 million each. When the defendants were unable to pay the third and final instalment, the claimants accepted this as a repudiatory breach and sold the aircraft to a third party for significantly less. They claimed US$7,254,178.24 in damages (taking into account a deposit already paid.)

Despite the protestations of the defendant that the aircraft might not have been delivered to them anyway and that they had been undersold to the third party, the court, *inter alia,* awarded the difference in price as damages.

"AerCap's case was straightforward. It had been seeking to re-market the Aircraft from January 2009 but had not been able to re-sell them prior to the resale agreement. There was thus no available market within s. 50(3) of the Sale of Goods Act 1979 ('s. 50(3)') until January 2010. Alternatively, AerCap was entitled to a reasonable period to go to the market before the market price was fixed. There was no allegation that AerCap had failed to mitigate and no allegation that the resale agreement was other than at arm's length. The price AerCap obtained for the Aircraft under the resale agreement evidenced – and was the best evidence of – the market price for February 2010." per Gross LJ at para 93

71.3 However, the court will generally take care not to compensate a claimant for more than his loss. The claimant should not be in a better position than he would have been without the breach.[34]

[34] See ***Sally Wertheim v. Chicoutimi Pulp Company*** **[1911] A.C. 301**

71.4 This has led to some controversial cases about whether a claimant who has been put to the expense of correcting/reinstating a faulty contractual performance is entitled to the cost of curing the fault or only the diminution in value caused by the breach of contract i.e. whether the court should address his 'performance interest' to give him the money to get the contract performed; or only his 'economic expectation' to put him in the financial (not physical) position he would have been in had the contract been performed.

Barrie sells Mike a clock for £100. In breach of the contract, there is a fault with the clock so that it is only worth £80. It will cost £50 to repair the clock.

To compensate Mike on an 'economic expectation' basis, the court will award him £20, so he will have an £80 clock plus £20, reasoning that he could sell the clock, leaving him with his original £100 to spend on another clock.

Alternatively, the court could award him £50 to get the clock repaired, so he would then end up with a working clock – i.e., the 'performance interest' he bargained for. But would he spend the £50 on the clock? If he has any sense, he will sell the clock and keep the damages, making him £30 better off.

Is he entitled to £20 or £50?

This depends on how you read the Rule in *Robinson v. Harman.*

That rule is that: "*he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."*

The question arises whether 'the same situation' means he is to be placed in the same FINANCIAL situation as if the contract had been performed (i.e., economic expectation); or the same PHYSICAL situation (i.e., performance interest.) The courts generally take the former view.

72 DIFFERENCE IN VALUE

72.1 Where the 'cost of cure' is higher than the 'difference in value', the latter will usually be awarded. This to some extent is based on the assumption that if it will cost more to remedy a defect than the economic loss suffered, the claimant will probably live with the defect and keep the extra money, which would over-compensate him. The problem with this analysis is that if the claimant does want to fix the defect, he will not have the funds to do so, and so will not end up with what he contracted for.

72.2 ***Phillips v. Ward*** **[1956] 1 WLR 471 (CA)**

A surveyor in breach of contract did not draw his client's attention to the fact that the roof timbers of the Elizabethan house he was about to buy were rotten. As a result, the client paid £25,000 for the house which was only worth £21,000. The repairs would cost £7,000.

HELD: The client was not entitled to £7,000 as this would mean he had a £21,000 house plus £7,000, equalling £28,000, which would make him £3,000 better off than he was originally promised he would be. He has entitled only to the difference between the price he paid for the house and its value when he bought it: £4,000.

"The general rule is that the injured person is to be fairly compensated for the damage he has sustained, neither more nor less." per Denning L.J. at p.473

72.3 ***Ford v. White*** **[1964] 1 WLR 885**

George and Florence Ford bought a house known as 'The Cobbles' and the adjoining plot for £6,350 after being advised by their solicitors that they could build on the plot. The solicitors were in breach of contract for not noticing a covenant against building on the plot. The property was in fact worth £6,350 but would have been worth £1,250 more if there had been no covenant. It was held that the solicitors were not liable for this sum.

"The application of this measure of damage (£1,250) would place the plaintiffs not in the same position, but in a better position, than if the defendants had properly fulfilled their duty; that is to say, the plaintiffs would have not only a property equivalent in value to the price they paid for it, but would receive an additional £1,250 as a recompense for their disappointment that the property was not by that amount worth more than the price that they paid for it. Such a measure would, it seems to me, be wholly at variance with the basic principle, and would be tantamount to making the defendants liable on the footing that they warranted that their view was right. The point may perhaps be illustrated by taking a case with more extreme figures. A sees a picture on sale at £100. He consults an art expert, who negligently advises him that the picture is an old master worth £50,000. A buys the picture, but cannot in fact find a purchaser willing to pay more than £5 for it. Is his measure of damage £95 or £49,995? I should have thought obviously the former." per Pennycuick J. at p.888

72.4 ***Lazenby Garages v. Wright*** **[1976] 1 WLR 459 (CA)**

Lazenby, who were dealers in second-hand quality cars, bought a second-hand BMW 2002 for £1,325 which Wright agreed to buy at a price of £1,670. Wright then refused to accept or pay for it. Lazenby sold the car to another buyer for £1,770 and claimed £345 from Wright as the profit which they would have made on a sale to Wright (£1,670 minus £1,325) even though they had resold the car for more than Wright was going to pay for it. It was held that Lazenby 's claim must fail since they had suffered no loss. The argument that Lazenby might have sold a different car to the other buyer was rejected, as there is no 'available market' for second-hand cars as there is for new ones.

"Each second-hand car is different from the next, even though it is the same make. The sales manager of the plaintiffs admitted in evidence that some second-hand cars, of the same make, may sell better than others of the same year. Some may sell quickly; others may be sluggish. You simply cannot tell why. But they are all different...

"The buyer in this case could not have contemplated that the dealer would sell one car less. At most he would contemplate that, if they resold this very car at a lower price, they would suffer by reason of that lower price and should recover the difference. But if they resold this very car at a higher price, they would suffer no loss. Seeing that these plaintiffs resold this very car for £100 more than the sale to Mr. Wright, they clearly suffered no damage at all." per Lord Denning M.R. at p.462

72.5 ***Watts v. Morrow*** **[1991] 4 All ER 937 (CA)**

Ian Roscoe Watts bought a country house for £177,500 in reliance on a survey prepared by Ralph Morrow, a building surveyor. The house had substantial defects which were not revealed by the survey, and was, in fact, worth only £162,500. However, the repairs cost £33,961, which Watts claimed from Morrow.

HELD: Following *Phillips v. Ward*, Watts was only entitled to the difference between the purchase price and the actual market value.

73 EXCEPTIONAL CASES: REINSTATEMENT DAMAGES

73.1 The rule against the claimant making a technical profit by reinstatement is not inflexible. If the claimant has no reasonable option but to cure the defect (rather than just to keep the money) he may have the cost of cure awarded.

73.2 ***East Ham Corporation v. Bernard Sunley & Sons Ltd.*** **[1966] AC 406 (HL)**

Stone panels which had been fixed to the external walls of a school fell off, owing to defective fixing by the contractor. It was held that the contractor was liable for the cost of reinstating the stone panels, calculated at the date when the defect was discovered.

Lord Cohen quoted, with approval a passage in Hudson's Building and Engineering Contracts, 8th ed. (1959), p. 319: 'There is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage' and continued:

"In the present case it could not be disputed that it was reasonable for the appellants to insist upon reinstatement and in these circumstances, it necessarily follows that on the question of damage the trial judge arrived at the right conclusion." per Lord Cohen at p.434[35]

73.3 ***Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co Ltd.*** **[1970] 1 QB 447 (CA)**

Due to the defendant's breach of contract in installing a faulty heavy wax dispenser, the plaintiff's factory (which was housed in an old mill) was burnt down. It was held that the plaintiff could recover the full amount of building a new one even though this would be more valuable than the original. Lord Denning distinguished the case of *Phillips v. Ward* [1956].

"The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account."

per Lord Denning M.R. at p.468[36]

73.4 ***Haysman v. Mrs. Rogers Films Ltd.*** **[2008] EWHC 2494 (QB)**

Glen Haysman claimed damages for breach of contract by the defendant film company (R). H had entered into an agreement with R that R could use H's property as a film location. The contract had provided that R would indemnify H for loss or damage resulting solely and directly from the negligence of itself, its employees or agents in connection with R's use of the property. During filming, damage had been caused to H's property. R accepted that it had caused damage in breach of the agreement, including to both the inside of the house and to H's driveway which needed to be resurfaced as a result. H submitted that he was entitled to non-pecuniary loss, the cost of providing a security guard when the remedial work was undertaken and loss of a chance of subsequently entering into another location agreement. H further argued that he should recover damages for loss of earnings suffered as a result of having to attend the property when he would otherwise have been working.

R contended that the cost of repairing the driveway should be discounted to reflect the fact that, following improvement, it would be in a better condition than it had been prior to being used by R.

HELD: Damages were assessed on the following basis.

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[35] Cited with approval by Lord Lloyd in ***Ruxley Electronics and Construction Ltd. v. Forsyth*** **[1996] AC 344 (HL) at p.368**

[36] This case also supported the doctrine of fundamental breach, on which aspect it was overruled by the House of Lords in ***Photo Productions Ltd. v. Securicor*** **[1980] AC 827.**

(1) Once it was accepted that the proper and reasonable remedial scheme for the driveway was that proposed by H's expert and as the driveway had previously been in a good state of repair, there was no element of improvement for which H should give credit arising from the performance of that remedial work.

(2) In the circumstances, it was possible and appropriate to regard one of the important objects of the contract as being to provide peace of mind to the home owner who was permitting his property to be used as a location for a short period. It was within the contemplation of H and R that a failure by R to reinstate or indemnify in respect of damage would cause anxiety or distress to H and that such loss was recoverable. The inconvenience had also interfered with H's enjoyment of his property and he was entitled to be compensated for that and the inconvenience he would be put to in carrying out repairs.

(3) H and R would have contemplated that if damage was caused to H's home or there was a failure to indemnify in respect of such damage, H would have to devote time and effort to remedying the problems caused and might incur financial loss as a result. In the absence of any evidence of specific work lost, it was appropriate to assume that steps were taken to minimise the effect of H's absence from work. A fair approach was to assume that such steps were effective as often as they were not. Allowing for that and other difficulties of assessment, approximately half of the time identified was to be regarded as lost.

(4) The employment of security services was not a necessary or reasonable measure. It was not a loss which flowed from R's breach and was not a foreseeable consequence of that breach.

(5) The immediate reason for the lack of any location agreement in the 12-month period after R carried out the filming was that H had chosen not to make his home available for filming, rather than that R's breach prevented him from doing so. H had therefore not established that he was entitled to damages for loss of a chance of using his home as a film location.

73.5 Furthermore the court will sometimes award ‘excessive’ cost of cure damages when it would clearly not be just and reasonable to leave the claimant with only a nominal award and to permit the defendant simply to flout his specific contractual obligations.

73.6 ***Radford v. De Froberville*** **[1977] 1 WLR 1262**

The defendant (France Dzou De Froberville) covenanted to build a brick wall on a plot of land to mark the boundary between her land and that of the plaintiff. When she failed to do so, the plaintiff sued for the cost of carrying out the work himself. The defendant claimed that the land had not diminished in value due to the lack of a wall, and that a cheap pre-fabricated fence would do just as well to mark the boundary.

HELD: The plaintiff was entitled to the price of a brick wall (£3,400) since that was what the contract stipulated, rather than the mere cost of a pre-fabricated fence (£880) and the nominal diminution in property value.

“If Mr. Sher (counsel for the defendant) is right — the reality of the position is this: if the contract had been performed according to its terms, the plaintiff would have had his property bounded and enclosed by a wall of a particular height which did not obtrude into his land; which was maintainable wholly by his neighbour and which was constructed to a specification and design approved by the plaintiff as suitable for his adjoining property. What he is left with in fact, after eight years of patient endeavour and four years of exasperated litigation, is no wall at all, no right to demand one, no control over what is erected along his boundary, the expense of putting up a wall or fence of his own if he wants one and, for his trouble, the sum of 40 shillings or its decimal equivalent and the consolation of knowing that he has parted irrevocably with his adjoining land and his right of pre-emption for a consideration part of which has, in the event, turned out to be totally illusory.

“Now, if that is right, it produces, as it seems to me, a result so strange and so monstrously unjust that Mr. Bumble's animadversion on the nature of the law seems, by contrast, a model of restrained understatement. The purpose of the law is to remedy wrongs, not to perpetuate injustices.”

per Oliver J. at p.1268

"If he contracts for the supply of that which he thinks serves his interests - be they commercial, aesthetic or merely eccentric - then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit." per Oliver J. at p.1270

73.7 ***De Beers UK Ltd. v. Atos Origin IT Services UK Ltd*. [2011] BLR 274 (QBD T&C Court)**

DB, the famous diamond merchant, planned to move a major part of its operations to Botswana, the source of 25% of its diamonds. Because of the confidentiality required in its business, different departments within its organisation worked independently of each other, including the use of different and incompatible computer systems.

In order to rationalise and upgrade the system for the Botswana move, BDB contracted with Atos. The task proved to be extremely complex, and Atos was unable to complete it on time. When DBD refused to pay an interim invoice for £320,000 on the basis of the delays and poor quality of the work, Atos suspended work on the project. The work was never resumed, and each party claimed that the other was in repudiatory breach of contract. The court held that it was Atos which was in breach.

BDB claimed, *inter alia*, the cost of engaging a third party, ThoughtWorks, to complete the task in accordance with the original contract. Following Radford v. De Froberville, the court awarded the cost of reinstatement, with some deductions for additional services and costs not attributable to the breach.

"In this case, DB was buying the services for itself. If there is a substantial non-delivery of those services, as there was in the present case at the date of termination, then DB is entitled to recover the cost of purchasing elsewhere the services not provided, unless it would be unreasonable of it to do so."
per Edwards-Stuart J. at para 345

74 *RUXLEY v. FORSYTH*: REASONABLENESS AND PROPORTIONALITY

74.1 In ***Ruxley Electronics and Construction Ltd. v. Forsyth*** the 'cost of cure' was denied even in a specific building contract, thus leaving the claimant in the potentially invidious position of having a building he did not want (a shallow swimming pool) without the funds to have it rebuilt to the correct depth. This was because the court considered the cost of reinstatement would be unreasonable in that particular case. The question of reasonableness will be judged on a case-by-case basis.

74.2 ***Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] AC 344 (HL)**

The plaintiff contracted to build a swimming pool for the defendant (Stephen Forsyth) in his garden. The contract specified that there should be a diving area 7 feet 6 inches deep. When complete, the diving area was only 6 feet deep, which was still deep enough for diving off the edge, but precluded the addition of a diving board. The value of the pool was not diminished by the breach of contract, but the cost of remedying the defect would be £21,560. Forsyth argued that he needed the extra depth as he was a big man and did not feel safe diving in only six feet of water.

The Court of Appeal awarded Forsyth the full cost of reinstatement. However, this was overturned by the House of Lords, who said, *inter alia*, that the cost of reinstatement was out of proportion to the diminution in value. They therefore awarded him nothing for the swimming pool (as that was the diminution in its value), but did allow him to retain an award of £2,500 for loss of amenity which had been granted by the High Court.

The House of Lords approved the judgment in *Radford v. De Froberville*, but held that it did not apply to the current facts, each case having to be decided according to its own circumstances to see whether the costs of reinstatement are reasonable.

"Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure." per Lord Jauncey at p.357

"What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective, it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus, if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing. Furthermore, in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly, if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do… However, where the contractual objective has been achieved to a substantial extent the position may be very different." per Lord Jauncey at p.258

Various reasons were given as to why the cost of reinstatement would have been unreasonable in this case.

1) The swimming pool, as constructed, was substantially the thing contracted for, and perfectly adequate for its main purpose.

2) The claimant clearly did not care that much about the shallower pool as he had not even raised the matter until quite late in the proceedings.

3) The claimant had not convinced the court that he would spend the damages on rectifying the breach even if they were awarded to him, so the money would simply be a windfall to him.

4) The cost of the reinstatement – which would include the cost of demolishing a perfectly good pool and building a virtually identical one in its place – would be out of all proportion to the good to be obtained.

"First, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the good to be obtained, and secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award."

per Lord Lloyd at p.367

"If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value. If the judge had assessed the difference in value in the present case at, say, £5,000, I have little doubt that the Court of Appeal would have taken that figure rather than £21,650. The difficulty arises because the judge has, in the light of the expert evidence, assessed the difference in value as nil. But that cannot make reasonable what he has found to be unreasonable." per Lord Lloyd at p.369

"A man contracts for the building of a house and specifies that one of the lower courses of brick should be blue. The builder uses yellow brick instead. In all other respects the house conforms to the contractual specification. To replace the yellow bricks with blue would involve extensive demolition and reconstruction at a very large cost. It would clearly be unreasonable to award to the owner the cost of reconstructing because his loss was not the necessary cost of reconstruction of his house, which was entirely adequate for its design purpose, but merely the lack of aesthetic pleasure which he might have derived from the sight of blue bricks. Thus in the present appeal the respondent has acquired a perfectly serviceable swimming pool, albeit one lacking the specified depth. His loss is thus not the lack of a usable pool with consequent need to construct a new one. Indeed were he to receive the cost of building a new one and retain the existing one he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide."

per Lord Jauncey at p.358

74.3 n.b. The Sale of Goods Act 1979 s.51(3), governs damages for the non-delivery of goods for which there is an available market:-

THE SALE OF GOODS ACT 1979 s.51(3)

"Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of refusal to deliver."

75 THE INTENTION OF THE CLAIMANT

75.1 It has been repeatedly averred by the courts that it is not the business of the judge whether the claimant will actually spend his damages on rectifying the breach. Thus, if you are awarded damages to repair a faulty item, you may choose instead simply to keep the item as it is and spend the money on something else.

75.2 ***Ruxley Electronics and Construction Ltd. v. Forsyth*** **[1996] AC 344 (HL)**

"I should emphasise that in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established. Thus, irreparable damage to an article as a result of a breach of contract will entitle the owner to recover the value of the article irrespective of whether he intends to replace it with a similar one or to spend the money on something else. Intention, or lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant." per Lord Jauncey at p.359

75.3 ***De Beers UK Ltd. v. Atos Origin IT Services UK Ltd*****. [2011] BLR 274 (QBD T&C Court)**

"Provided that it would be reasonable for a person in the position of B to purchase those services elsewhere, it does not matter whether or not DB has an actual intention of doing so or has not made up its mind whether or not to do so." per Edwards-Stuart J. at para 345

75.4 However (and perhaps somewhat inconsistently) the courts *will* consider the intentions of the claimant in deciding whether it is reasonable to grant the cost of reinstatement. If the claimant clearly has no intention of spending the money on curing the defect, then he is not likely to be awarded it.

75.5 ***Tito v. Waddell (no 2)*** **[1977] Ch. 106**

"If the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages."

per Sir Robert Megarry VC at p.332

75.6 ***London Fire and Emergency Planning Authority v. Halcrow Gilbert Ass.*** **(2008) 24 Const. L.J. 103**

The claimant (L) brought a claim for breach of contract against the defendant engineer (H). L, a local fire authority, had contracted with H to design a facility where fire fighters could train in simulated operational conditions including fire, heat and smoke. Due to a defective design, the facility twice caught fire.

However, design aside aside, the facility proved to be defective in another way not related to the defendant: The simulated smoke used tended to sit at ground level, whereas in a real fire, the smoke would usually rise. As the judge commented:

"I was told that this was disastrous for real fire training since in a real fire, trainees should bend down to look under the smoke but as a result of the training would be likely to stand up to try to look over the smoke." per Judge Toulmin Q.C

L took the view that it was not possible to use the facility for the purpose for which it had been designed and began to conduct training elsewhere. L contended that H was liable for defective design and for failing to review the design after the first fire; it sought damages totalling £4.74 million for the cost of the repairs, the investigation of the cause of the fire, the replacement of defective equipment and the cost of conducting training elsewhere.

HELD: It would be reasonable to award the cost of reinstatement if it was intended thereby to put the injured party in the same position as he would have been in if he had not sustained the wrong, but it would be unreasonable for the injured party to insist on reinstatement if the cost was out of all proportion to the benefit to be obtained, in which case he would be confined to the difference in value. Although it was irrelevant what that party did with any damages he received, his intention to reinstate or not to reinstate, whilst not conclusive, was relevant to the question of reasonableness. In the instant case, the evidence indicated that L had no intention to reinstate and that it would not be reasonable for it to do so, as it was now apparent that, for technical reasons, such a facility was unsuitable for hot fire training. Accordingly, damages would not be awarded on the cost of reinstatement.

75.7 The issue of the relevance of the claimant's intention to spend the damages on reinstatement was reviewed by the Lord Lloyd in ***Ruxley Electronics*****.**

Ruxley Electronics and Construction Ltd. v. Forsyth **[1996] AC 344 (HL)**

"I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate. Suppose in the present case Mr. Forsyth had died, and the action had been continued by his executors. Is it to be supposed that they would be able to recover the cost of reinstatement, even though they intended to put the property on the market without delay?...

"In the present case the judge found as a fact that Mr. Forsyth's stated intention of rebuilding the pool would not persist for long after the litigation had been concluded. In these circumstances it would be 'mere pretence' to say that the cost of rebuilding the pool is the loss which he has in fact suffered… If, as the judge found, Mr. Forsyth had no intention of rebuilding the pool, he has lost nothing except the difference in value, if any. The relevance of intention to the issue of reasonableness is expressly recognised by the respondent in his case. In paragraph 37, Mr. Jacob says: 'The respondent accepts that the genuineness of the parties' indicated predilections can be a factor which the court must consider when deciding between alternative measures of damage. Where a plaintiff is contending for a high as opposed to a low-cost measure of damages the court must decide whether in the circumstances of the particular case such high-cost measure is reasonable. One of the factors that may be relevant is the genuineness of the plaintiff's desire to pursue the course which involves the higher cost. Absence of such desire (indicated by untruths about intention) may undermine the reasonableness of the higher cost measure.'

"I can only say that I find myself in complete agreement with that approach." per Lord Lloyd at p.372

IV: RELIANCE LOSS

76 THE GENERAL RULE

76.1 Instead of claiming for expectation loss (loss of profits), the claimant may instead claim for wasted expenses incurred in reliance on the contract, even if these expenses were incurred before the contract was made. The claimant cannot claim both expectation loss and reliance loss.

76.2 The choice is normally with the claimant, but the court may not allow a claim for reliance loss when it is clear that the money would have been wasted even if the contract had been fulfilled (e.g., if the claimant made a bad bargain in the first place.)

76.3 ***Anglia Television Ltd. v. Reed [*1972] 1 QB 60 (CA)**

Robert Reed, a well-known American actor – he was in *The Brady Bunch* – contracted with ATV to play the lead role of Harvey in a television play they were producing called "The Man In The Wood" in which an American man has an adventure in an English wood. (Sounds great, huh?)

ATV involved themselves in a great deal of expense both before and after hiring Reed. Reed was double-booked, and repudiated the contract with ATV. They abandoned the project and sued him both for the pre-contract expenditure (£1,895.35) and the post-contract expenditure (£854.65). It was held that they could recover both.

"A plaintiff in such a case as this has an election: he can either claim for loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both...

"If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken... It is true that, if the defendant had never entered into the contract, he would not be liable, and the expenditure would have been incurred by the plaintiff without redress; but, the defendant having made his contract and broken it, it does not lie in his mouth to say he is not liable, when it was because of his breach that the expenditure has been wasted."

per Lord Denning M.R. at p.64

77 BAD BARGAINS

77.1 The claimant may not get damages for reliance loss if the defendant can prove that his breach has actually given the claimant a financial advantage. This is an application of the **Rule in *Robinson v. Harman* and the Rule in *British Westinghouse.***

77.2 Treitel has argued that a claim for reliance loss should not be affected by the rules relating to claims for expectation loss, but judicial opinion has not supported this view.[37]

77.3 ***C & P Haulage v. Middleton* [1983] 3 All ER 94 (CA)**

Middleton, a car engineer, was granted a contractual licence to occupy premises on a renewable six-monthly basis. It was expressly provided that any fixtures put in by him would become the property of the landlord. Middleton spent money on fixtures, but was unlawfully ejected ten weeks before the end of a six-month's term. As a temporary measure, he set up business in his own garage, and worked there until long after his licence would have expired, thus saving himself rent. As he had suffered no loss of profits because of the move (indeed he was better off), he claimed instead his wasted expenditure on installing the fixtures in the landlord's premises. It was held that he was not entitled to this, as the expenditure on improvements to the premises would still have been lost even if the licence had been validly terminated at the end of the six months. In effect, he was trying to recover from a bad bargain.

[37] See ***Omak Maritime Ltd. v. Mamola Challenger Shipping Co.* [[2011] 1 Lloyd's Rep. 47,** 76.4 below

"He is not claiming for the loss of his bargain, which would involve being put in the position that he would have been in if the contract had been performed. He is not asking to be put in that position. He is asking to be put in the position he would have been in if the contract had never been made at all. If the contract had never been made at all, then he would not have incurred these expenses, and that is the essential approach he adopts in mounting this claim; because, if the right approach is that he should be put in the position in which he would have been had the contract been performed, then it follows that he suffered no damage...It is not the function of the courts where there is a breach of contract knowingly...to put the plaintiff in a better financial position than if the contract had been properly performed."

per Ackner L.J. at p.98/99

77.4 ***Omak Maritime Ltd. v. Mamola Challenger Shipping Co.*** **[2011] 1 Lloyd's Rep. 47**

Mamola, the owners of a ship called the Mamalo Challenger, chartered it to Omak for five years at $13,700 per day. Under the charterparty, Mamola was required to install a new crane on the ship, at a cost of $675,000. After the crane had been installed, Omak became unable to take the ship, and Mamola accepted this repudiatory breach of contract and claimed damages. However, the market rate of hire had substantially increased since the time of making the contract with Omak, and Mamola were able to hire out their ship for about £7,500 more per day to other companies. As a result of this, over a five-year period, Mamola were going to be substantially in profit, even taking account of the wasted expense of installing the crane.

As they had suffered no expenditure loss, Mamola claimed instead the cost of installing the crane as reliance loss. The court held (overruling the arbitral tribunal) that they were not entitled to it. The rise in the market meant that they were already better off than if the contract had been performed, and the court would not further enhance this by an award of damages for reliance loss.

"The tribunal's error was to regard a claim for wasted expenses and a claim for loss of profits as two separate and independent claims which could not be "mixed". But the weight of authority clearly shows that both claims are illustrations of, and governed by, the fundamental principle stated by Baron Parke in Robinson v. Harman. That principle requires the court to make a comparison between the claimant's position and what it would have been had the contract been performed. Where steps have been taken to mitigate the loss which would otherwise have been caused by a breach of contract that principle requires the benefits obtained by mitigation to be set against the loss which would otherwise have been sustained. To fail to do so would put the claimant in a better position than he would have been in had the contract been performed." per Teare J. at para 65

77.5 Thus, a claim for reliance loss will fail if either:

I. The claimant has made a profit from the breach which exceeds his reliance loss; or

II. The claimant would have lost money on the contract had it been performed and so would not have recouped his expenditure.

77.6 The burden of proving either of these (which amount to much the same thing) is on the defendant.

77.7 ***C.C.C. Films (London) Ltd. v. Impact Quadrant Films Ltd.*** **[1985] 1 QB 16**

The plaintiffs paid the defendants US$12,000 for a licence to exploit, distribute and exhibit three films: "Dead of Night", "Devil's Orgy" and "Children Shouldn't Play With Dead Things." The defendants failed to deliver the tapes of these films, and the plaintiffs sued them for damages for loss of profits. However they failed to adduce any evidence as to the amount of profit, if any, they might have made from the films, so they abandoned that claim, and claimed instead for the US$12,000 they had wasted in obtaining the unusable licence. The defendants claimed that the plaintiffs were not entitled to their wasted expenditure, as they had not proved that they would have recouped it with their profits even if the contract had been properly performed. HELD: The burden of proof was on the defendants to show that they would not have recouped the loss. The plaintiff's claim therefore succeeded.

On the rule in *C & P Haulage*: *"It is common ground that a claim for wasted expenditure cannot succeed in a case where, even had the contract not been broken by the defendant, the returns earned by the plaintiff's exploitation of the chattel or the rights of the subject matter of the contract would not have been sufficient to recoup that expenditure."* per Hutchinson J. at p.32

On the burden of proving that the profits would not have recouped the expenditure: *"Even without the assistance of such authorities, I should have held on principle that the onus was on the defendant. It seems to me that at least in those cases where the plaintiff's decision to base his claim on abortive expenditure was dictated by the practical impossibility of proving loss of profit rather than by unfettered choice, any other rule would largely, if not entirely, defeat the object of allowing this alternative method of formulating the claim... It appears to me to be eminently fair that in such cases where the plaintiff has by the defendant's breach been prevented from exploiting the chattel or the right contracted for and, therefore, putting to the test the question of whether he would have recouped his expenditure, the general rule as to onus of proof of damage should be modified in this manner."*

per Hutchinson J. at p.40

V: SPECULATIVE DAMAGES

78 THE GENERAL RULE

78.1 The claimant may claim for the loss of an opportunity to gain some benefit, even if it is not certain that he would have got that benefit had the contract been performed.

78.2 ***Simpson v. The London and North Western Railway Co.*** **(1876) I QBD 274**

The plaintiff was a manufacturer of cattle-food, and was in the habit of attending agricultural shows to exhibit samples of his goods. The defendants, a railway company, were contracted to deliver his goods to a three-day show in Newcastle, but the goods arrived after the event. The plaintiff claimed loss of profit for potential contracts he might have made at the Newcastle show. HELD: As the parties knew that he wanted to exhibit his goods at the show to potential buyers, he was entitled to damages for his possible loss of profit, even with no evidence of his prospect of making a profit at the particular show in question. The fact that the damages were speculative was no bar to their being awarded.

"As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all." per Cockburn C.J. at p.277

78.3 ***Chaplin v. Hicks*** **[1911] 2 KB 786 (CA)**

Hicks, a theatrical manager, placed an advertisement in a London daily newspaper inviting young ladies who wished to be actresses to send him their photograph and details. From those applicants he would select twenty-four photographs and publish them in the newspaper. The readers of the newspaper would then pick twelve winners to whom he would give professional engagements for three years at salaries ranging from £3 to £5 per week. 6,000 photographs were received, so Hicks changed the rules: the public would pick the fifty most beautiful girls, from whom he would select the final twelve himself. (Nice work, if you can get it!) Miss Chaplin was one of the fifty finalists.

She was notified on January 5 that she must attend an interview in London on January 6. As she was in Dundee at the time, she could not keep this appointment, and Hicks refused to offer her another one. She was not one of the twelve chosen, and she sued Hicks for her lost opportunity. The jury found that Hicks had not given her a reasonable opportunity to present herself, and awarded £100 in damages. It was not contended by Hicks that there was no breach of contract, but only that the damages should have been nominal, either because they were too remote, or because they were unassessable. The Court of Appeal held that the damages were neither too remote nor unassessable.

"It is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case." per Fletcher Moulton L.J. at p.795

78.4 ***Giedo van der Garde BV v. Force India Formula One Team Ltd.*** **[2010] EWHC 2373**

Giedo van der Garde is a young Dutch racing driver with aspirations to become a Formula One driver. In order to further his career, he made a contract with an English company which operates FIFOT, one of the teams which compete in the FIA Formula One World Championships. In return for $3 million, the defendant agreed, *inter alia,* to permit Giedo to drive a Formula One racing car in testing and/or practising and/or racing for a minimum of 6,000km, and, subject to Giedo holding a valid licence, to drive during the Grand Prix Friday morning test sessions. In the event, he only got to drive 2,004 km in the contract period, though 266km of the shortfall was his own fault for not attending a booked session. He claimed, *inter alia*, for damages for the negative impact that this would have on his career.

HELD: The basic value of the lost mileage was $500 per kilometre, giving him damages of $1,865,000. In addition, the value of the lost opportunity to complete the testing, which would have increased his chances of obtaining a paid Formula One race seat, was set (somewhat arbitrarily) at $100,000.

"I am persuaded by the evidence that the claim for a loss of opportunity crosses the threshold that separates the speculative from the real and substantial. I broadly accept Mr Gallagher's evidence that Mr Van der Garde's chances of ultimately obtaining a paid Formula One race seat would have been doubled had he been able to complete the 6,000 odd kilometres to which he was entitled. It is clear to me that it is not possible on the evidence to put a precise or even ballpark figure on the financial benefits which he would have received or to be precise about when he would have received them if the chance the doubling of which he was deprived of had materialised. It does not however in my judgment follow from that that he is entitled only to nominal damages under this head. It having been established on the balance of probabilities that he was deprived by Spyker's breach of contract of a real and substantial chance of obtaining financial benefit, his entitlement to an award of damages to reflect the loss of that chance is not in my view extinguished or frustrated by the inability to assess it by means of a precise mathematical formula. There is in my view clear evidence that if Mr Van der Garde had succeeded in obtaining a paid test seat and thereafter a paid racing seat, he would have earned significant sums by way of salary and sponsorship income.

"It does on the other hand seem to me that the large number of imponderables requires the court to exercise caution and restraint in assessing an amount of damages which fairly reflects the claimant's loss. In my view the $500,000 contended for by Mr de Garr Robinson is considerably too high. It does not adequately reflect the fact that the experts considered it unlikely that he would have obtained a Super Licence in 2007 or 2008 or the fact that if he obtained a seat at all in 2008 it would have been likely to be a testing seat rather than a race seat, for which it is to be inferred that the financial benefits would have been considerably less than for a race seat. Nor does it adequately reflect the intense competition for both testing and race seats and the even greater competition for paid seats. Given the inability to calculate damages by a precise mathematical formula any sum awarded must necessarily be the result of a broad-brush approach. As in other areas of the law of damages that is not in itself in my view a bar to making an award. Doing the best I can to reflect the totality of the evidence on this point I consider that an award of $100,000 would most fairly compensate the Claimants for their loss under this head." per Stadlen J. at paras 411 and 412

78.5 ***Dickinson v Jones Alexander & Co*** **[1993] 2 FLR 521**

A wife instructed solicitors to commence divorce proceedings after 29 years of marriage. She had enjoyed a very comfortable lifestyle with her wealthy husband, but due to the negligent advice of her solicitors she did not make an appropriate claim against her husband and ended up in a small house on a limited income. She suffered mental distress as a result and made a claim for the amount of the settlement she might have got on proper advice having been given.

The court held that speculative damages could be assessed by taking account of the number of contingencies upon which the chance depended, and the likelihood of there being satisfied in the claimant's favour. In this case the wife was awarded an amount equivalent to what she would probably have got under the Matrimonial Causes Act 1973 - one third of her husband's assets!

78.6 However, you should be careful what you wish for. When Bette Davis quit Warner Bros. in breach of her contract

Warner Bros. Pictures Incorporated v. Nelson **[1937] 1 KB 209**

Bette Davis agreed to give her services as a film actress exclusively to Warner Bros. for 52 weeks. She decided to work elsewhere for better pay, and Warner Bros. claimed an injunction to restrain her, during the period of her contract "from rendering without the written consent of the plaintiffs... any services for or in any motion picture or stage production or productions of any person firm or corporation other than the plaintiffs." The court considered, inter alia, whether damages would be a more appropriate remedy than an injunction, but decided not on the basis that they would be impossible to calculate.

"With regard to the question whether damages is not the more appropriate remedy, I have uncontradicted evidence of the plaintiffs as to the difficulty of estimating the damages which they may suffer from the breach by the defendant of her contract.

"I think it is not inappropriate to refer to the fact that, in the contract between the parties, in clause 22, there is a formal admission by the defendant that her services, being 'of a special, unique, extraordinary and intellectual character' gives them a particular value 'the loss of which cannot be reasonably or adequately compensated in damages' ". per Branson J. at p.220

"Convinced that her career was being damaged by a succession of mediocre films, Davis accepted an offer to appear in two films in England. Knowing that she was breaching her contract with Warner Brothers, she fled to Canada to avoid legal papers being served upon her. Eventually brought to court in England, she later recalled the opening statement of the barrister, Sir Patrick Hastings, who represented Warner Brothers. Hastings urged the court to "come to the conclusion that this is rather a naughty young lady and that what she wants is more money". He mocked Davis's description of her contract as "slavery" by stating, incorrectly, that she was being paid $1,350 per week. He remarked, "if anybody wants to put me into perpetual servitude on the basis of that remuneration, I shall prepare to consider it". The British press offered little support to Davis, and portrayed her as overpaid and ungrateful.

"Davis explained her viewpoint to a journalist, saying "I knew that, if I continued to appear in any more mediocre pictures, I would have no career left worth fighting for". Davis's counsel presented her complaints - that she could be suspended without pay for refusing a part, with the period of suspension added to her contract, that she could be called upon to play any part within her abilities regardless of her personal beliefs, that she could be required to support a political party against her beliefs, and that her image and likeness could be displayed in any manner deemed applicable by the studio. Jack Warner testified, and was asked, "Whatever part you choose to call upon her to play, if she thinks she can play it, whether it is distasteful and cheap, she has to play it?" Warner replied, "Yes, she must play it." Davis lost the case and returned to Hollywood, in debt and without income, to resume her career. Olivia de Havilland mounted a similar case in 1943 and won." http://en.wikipedia.org/wiki/Bette_Davis

VI: RESTITUTIONARY/ DISGORGEMENT DAMAGES

79 THE GENERAL RULE

79.1 Contractual damages are meant to compensate the victim of the breach, not to penalise the party in breach. Thus, even if someone deliberately breaches a contract to make a profit, the victim of the breach is not *per se* able to demand a share of that profit.

79.2 However, there are exceptions to that principle in cases where 'compensatory damages' alone are considered to be inadequate and where 'restitutionary damages'[38] are deemed appropriate.

i. When a defendant required the claimant's permission to exploit a property, but has exploited the property without that permission, he may be required to pay the claimant a fee or royalty as if he had been granted permission. (This will normally be in lieu of an injunction.) Although these are typically characterised as restitutionary in nature, they are also compensatory to the extent that the claimant is being placed in the financial position he would have been in had he agreed to the action which is, in fact, a breach of contract.

ii. In exceptional cases, the court may award the claimant the whole of the defendant's profits (an 'account of profits'). These are essentially exemplary/punitive damages, though not characterised as such by the courts.

79.3 There are conflicting cases on this matter.

80 DAMAGES IN LIEU OF AN INJUNCTION

80.1 The leading case on damages in lieu of an injunction is ***Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd***., and such damages are accordingly called 'Wrotham Park Damages'.

Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. **[1974] 1 WLR 798 (Ch.D.)**

In 1935 the owner of an estate sold part of the land to a developer, subject to a restrictive covenant that the developer would not develop the land without the prior approval of a layout plan by the estate owner. In 1971, in breach of this covenant, the successor in title to the land built 14 houses. The successors in title to the estate sought an injunction to have the houses demolished.

The court held that it would be "an unpardonable waste" to order the demolition of the much needed houses, but decided instead to award damages in lieu of an injunction, as is permitted under the Chancery Amendment Act 1858 (the so-called 'Lord Cairns's Act'.)

The defendant argued that the damages should be nominal because the value of the claimant's property had not been diminished in any way by the breach of covenant. However, the court adopted the approach taken in trespass cases, which is essentially to imagine that the claimant had agreed to the trespass and to ask what he would have charged by way of rent. Thus, the court asked what would have been a fair price for the claimant to demand for an alteration in the covenant to permit the building (even though, in practice, the claimant would never have agreed to it.)

On that basis, the claimant was awarded 5% of the defendant's profit in developing the land in breach of covenant. As the profit was £50,000, the claimant was awarded £2,500.

[38] In ***AG v.Blake*** **[2001] 1 AC 268, 284**, Lord Nicholls called the phrase 'restitutionary damages' an "unhappy expression", though without really suggesting a happier alternative.

80.2 The Court of Appeal disapproved of this case in ***Surrey County Council v. Bredero Homes Ltd.*** **[1993].**

Surrey County Council v. Bredero Homes Ltd. **[1993] 1 WLR 1361 (CA)**

Two councils held adjoining land, which had been acquired to facilitate the building of a road. By 1980, the road was built and they offered the land for housing development. They accepted an offer by a development company to sell it the land provided that it would only be developed in accordance with Surrey CC's development brief. However, having bought the property, the developer obtained new planning permission, which enabled it to build more houses at a greater profit. The houses were built and sold, and the council sought damages based on the profit made. Applying the Rule in *Robinson v. Harman*, the Court of Appeal awarded only nominal damages. The court distinguished the decision in *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974] as the instant case was not a case of damages in lieu of an injunction. However, the *Wrotham* decision was also criticised for not considering inconsistent precedents.

80.3 The House of Lords in *Attorney General v. Blake* [2001] stated its preference for *Wrotham* over *Bredero* and confirmed the principle of awarding hypothetical profits in lieu of an injunction.

81 AN ACCOUNT OF PROFITS

81.1 The remedy of an 'account of profits' (i.e., to award the claimant all the profits made from a breach by the defendant) has long been available for breach of a fiduciary duty, and was extended to breaches of contract by the House of Lords in ***Attorney General v. Blake*** [2001]. They emphasised that it would only be available in exceptional cases. There are no fixed rules.

81.2 ***Attorney General v. Blake*** **[2001] 1 AC 268 (HL)**

George Blake had been a member of the Secret Intelligence Service, and in 1944 had signed an undertaking not to divulge any official information gained as a result of his employment. Between 1951 and 1960, he sold secrets to the Soviet Union, and was sentenced to 42 year's imprisonment. He escaped in 1966 and went to live in Moscow. In 1989 he wrote an autobiography, featuring many of the secrets he had contracted not to divulge. This was not only a breach of contract, but also a criminal offence under the Official Secrets Act 1989.

Blake obtained a deal for his book with a UK publisher worth £150,000 of which he had already £60,000. The Crown sued *inter alia* for damages for breach of the contract. As the 'secrets' divulged by Blake were no longer confidential, the Court of Appeal found that the Crown had suffered no loss and held that contractual damages would be no more than nominal. However, the court granted an injunction to prevent Blake from receiving payments to enforce the public policy that a criminal should not benefit from his crime. Blake appealed and the Crown cross-appealed to the House of Lords for substantial contractual damages.

HELD: (i) Although the injunction was interlocutory in character – to freeze the defendant's assets until he returned to England to answer the case – as there was no prospect that he would ever return, it was effectively a confiscation order made without a trial or compensation, and was therefore not within the jurisdiction of the common law.

(ii) However, it was also held that in an exceptional case, it might be just and equitable that contractual damages should be awarded to reflect the whole of a defendant's profit from a breach, rather than the loss to the claimant. This was such a case. Had the information still been confidential, Blake's action would have been a breach of fiduciary duty, and there would be no problem in making such an award in equity. In the circumstances, the same principle should apply here. There was a need for an absolute rule against disclosure to protect the confidentiality of secret agents, on top of which Blake had capitalised on his notoriety as a Soviet spy to secure such high royalties.

All things considered, the publishers were ordered to pay all the money owed to Blake over to the Crown.

"My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression "restitutionary damages". Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract."

per Lord Nicholls at p. 284

It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. It would be difficult, and unwise, to attempt to be more specific." per Lord Nicholls at p..285

"It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense.

"In considering what would be a just response to a breach of Blake's undertaking the court has to take these considerations into account. The undertaking, if not a fiduciary obligation, was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach. Had the information which Blake has now disclosed still been confidential, an account of profits would have been ordered, almost as a matter of course. In the special circumstances of the intelligence services, the same conclusion should follow even though the information is no longer confidential. That would be a just response to the breach. I am reinforced in this view by noting that most of the profits from the book derive indirectly from the extremely serious and damaging breaches of the same undertaking committed by Blake in the 1950s. As already mentioned, but for his notoriety as an infamous spy his autobiography would not have commanded royalties of the magnitude Jonathan Cape agreed to pay."

per Lord Nicholls at p..287

81.3 Although exceptional, the remedy of an account of profits is clearly not limited to the extraordinary facts of ***Attorney General v. Blake*****.**

81.4 ***Esso Petroleum Company Limited v. Niad Limited*** **[2001] All ER (D) 324**

On 10th June 1993 Niad Ltd. – who ran the Leyburn Service station - entered into a five-year solus agreement with Esso. It provided for Niad to buy all its requirements of motor fuels from Esso. The price was to be Esso's wholesale Schedule Price to dealers at the date for delivery. The agreement provided for Niad to receive a rebate of 2.42 pence per litre calculated and payable quarterly in arrear and an additional rebate payable annually in arrear if total sales exceeded 3.3m litres.

On Jan 17 1996, Esso launched a promotion called 'Pricewatch' in which it guaranteed to match the prices for fuel charged by the local major supermarkets. This involved the dealers in monitoring the cost of petrol in local supermarkets and entering them into a computer programme, which would modify the price at the relevant Esso station accordingly. The dealers would be recompensed by Esso for any reduction in income this might cause.

In breach of this agreement, Niad deliberately charged more than the Pricewatch recommended price in order to increase its own profits. Indeed, the manager, Mr Walton, simply charged as much as he considered the market would stand so as to increase his profit whilst at the same time maintaining the volume of his sales.

Esso successfully sued to establish that Niad were liable for breach of contract. Esso also asked the court what remedies were available to it for future action. The questions were: (1) Is Esso entitled to an account of profits as a remedy for the breaches of contract by Niad and (2) Is Esso entitled to a restitutionary remedy requiring Niad to pay to Esso the amount by which the actual prices charged to customers exceeded the recommended prices. The answer to both questions was 'yes' (though the court suggested that the latter might be a more suitable remedy in this case.

On the issue of the account of profits and the application of *AG v. Blake*, the Chancellor had this to say:

"Esso claims that it ought to be afforded such a remedy in this case. It points out that the obligation to implement and maintain the recommended prices was fundamental to the whole Pricewatch scheme as explained at the presentation as described in paragraph 22 above. It can fairly be said that Niad did the very thing it contracted not to do and in a manner designed to obscure the policy Niad was in fact following, as explained in paragraph 33 above.

"For Niad it was contended that the operation of Pricewatch reduced its profits, as shown by the figures referred to in paragraph 32 above. It contended that it would be wrong to grant the remedy of an account of profits so as thereby to enforce loss-making terms which were both unfair and unreasonable.
"I do not accept the points relied on by Niad. Even though the profitability of the sale of motor fuels from the Leyburn Service station declined by 40% during the time Niad was in Pricewatch they still yielded a profit. There was nothing unfair or unreasonable in expecting Niad to observe the obligations of Pricewatch if it was to obtain the benefits.

"In my judgment the remedy of an account of profits should be available for breaches of contract such as these. First, damages is an inadequate remedy. It is almost impossible to attribute lost sales to a breach by one out of several hundred dealers who operated Pricewatch. Second, the obligation to implement and maintain the recommended pump prices was fundamental to Pricewatch. Failure to observe it gives the lie to the advertising campaign by which it was publicised and therefore undermines the effectiveness of Pricewatch in achieving the benefits intended for both Esso and all its dealers within Pricewatch. Third, complaint was made of Niad on four occasions. On all of them Niad appeared to comply without demur. It now appears that the breaches of its obligation were much more extensive than Esso at first thought. Fourth, Esso undoubtedly has a legitimate interest in preventing Niad from profiting from its breach of obligation."

per Sir Andrew Morritt, Chancellor of the High Court at paras 60 - 63

81.5 ***Attorney General v. Blake*** was considered by the Court of Appeal in ***Experience Hendrix LLC v. PPX Enterprises Inc.*** **[2003]** where the limits of the doctrine were examined.

Experience Hendrix LLC v. PPX Enterprises Inc. **[2003] 1 All ER (Comm) 830 (CA)**

In 1965, Jimi Hendrix entered into an exclusive recording contract with PPX. In 1967 PPX sued Hendrix for breach of the exclusivity agreement. The matter came to trial in 1973, Hendrix himself having died aged 27 in 1970. A settlement was agreed under which the Hendrix estate granted PPX the rights to the masters of recordings listed in Schedule A of the agreement, provided that the estate would be entitled to certain royalties. PPX also were given the right to exploit recordings not in Schedule A, provided that they got the prior consent of the estate.

In breach of the agreement, PPX exploited the non-Schedule A recordings without consent. The estate (now represented by Hendrix's father, the sole beneficiary) claimed damages, even though it was proved that the father would not have exploited the recordings himself, and so had suffered no financial loss due to the breach.

The Court of Appeal considered making PPX account for its profits made by the breach, but noted that the principle laid down in *Attorney General v. Blake* [2001] was to be applied in only the most extreme cases. Exploiting the works of Jimi Hendrix hardly fell into the same category as international espionage. However, the court was willing to award damages based on the principle in *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974]. As it was too late to grant an injunction against using the materials (except for future use) the defendant could be ordered to pay damages in lieu of an injunction, based on the royalties the claimant would have obtained had they agreed to the use of the recordings. The court thought this should be at least a third of the defendant's profits (which is somewhat higher than the usual royalty rate).

81.6 Although there is a clear distinction between *Wrotham Park* restitutionary damages in lieu of an injunction (which might arguably be seen as compensatory) and an *AG v. Blake* account of profits (which is essentially penal in character), they are juridically similar awards, and so should be considered in conjunction with each other.

81.7 ***WWF World Wildlife Fund v. WWF World Wrestling Federation*** **[2008] 1 WLR 445 (CA)**

There had been a long running dispute between the World Wildlife Fund and the World Wrestling Federation regarding the use of the initials WWW. A compromise agreement was reached in 1994, whereby the Federation agreed to use the initials only in certain restricted situations, but it breached the agreement and was sued by the Fund.

In October 2001, Jacob J. granted the Fund an injunction, but refused its application for an account of profits. The Fund, at that time, deliberately did not make a claim for *Wrotham Park* damages as it thought this might prejudice its chance of getting an account of profits, but having been refused an account of profits, in 2004 the Fund claimed *Wrotham Park* damages instead. The Federation argued that they could not do so, as *Wrotham Park* damages were of the same character as an account of profits, and as the latter had already been denied them, they should be estopped *per rem judicatum*[39] from making the claim now.

HELD: Whilst accepting that the two remedies are juridically similar, the court did not see this as a reason why the refusal of an account of profits should preclude an application for *Wrotham Park* damages. However, the court held that by seeking in 2004 to add a claim on such a basis, which they could have raised before Jacob J in 2001 but had deliberately declined to do, the claimants were abusing the process of the court; and that, accordingly, the claimants should not be permitted to pursue their claim for damages on that basis.

On the subject of the nature of the two remedies, Chadwick L.J. had this to say:

"When the court makes an award of damages on the Wrotham Park basis it does so because it is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. Lord Nicholls's analysis in Blake's case demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong.

"The circumstances in which an award of damages on the Wrotham Park basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss. To label an award of damages on the Wrotham Park basis as a "compensatory" remedy and an order for an account of profits as a "gains-based" remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him.

[39] This is a defence to an action that it should be estopped because the matter has already been conclusively decided by another court.

"It follows, therefore, that although I would reject the premise on which the contentions in para 4 of the amended application notice are based (that an award of damages on the Wrotham Park basis is not an award of compensatory damages, but is properly to be characterised as a gains-based award), I would accept that, on a true analysis, the allegation in sub-para (d) (that the remedy now sought by the fund (an award of damages on the Wrotham Park basis) is "a juridically highly similar remedy to, the relief"—an account of profits—"previously sought") is well founded." per Chadwick L.J. at paras 59-60

VII: NON-FINANCIAL LOSS

82 THE GENERAL RULE

82.1 It is not generally possible to recover damages for the mental distress and disappointment caused by a breach of contract (*Addis v. Gramophone Co. Ltd.* 1909). As the purpose of contractual damages is to put the claimant in the FINANCIAL position he would have been in had the contract been performed, his MENTAL distress is not normally a factor (unless it causes financial loss).

82.2 ***Addis v. Gramophone Co Ltd.*** **[1909] AC 488 (HL)**

Addis was employed as manager of GC Ltd. in Calcutta. He was given six months notice, but at the same time GC Ltd. appointed Gilpin as his successor, and unlawfully took steps to prevent Addis from acting any longer as manger (which meant that he could not earn commission). Addis claimed both for the wrongful dismissal and for the distress at his humiliation. The House of Lords refused to award damages for his hurt feelings.

"If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment." per Lord Loreburn L.C. at p.491

82.3 ***Cox v. Philips Industries Ltd.*** **[1976] 1 WLR 638**

Glyn Cox was an industrial metallurgical engineer working for Intertherm Ltd. (a subsidiary of Philips Industries Ltd.) He was head-hunted by another company, and, in order to keep him, Intertherm offered him a promotion and annual increments in his salary. He accepted this, but wrote a letter of complaint when his increment turned out to be only £30. As a result of this letter, his employers demoted him, and threatened him with redundancy. Eventually he resigned, having suffered depression and anxiety. It was held that he had been wrongfully dismissed, and his damages would include £500 compensation for his distress at his demotion.

The judge distinguished Addis on the basis that the decision there arose out of a dismissal, rather than a demotion. However this decision was overruled in *Bliss v. SE Thames Regional Health Authority* [1987].

82.4 ***Bliss v. South East Thames Regional Health Authority*** **[1987] ICR 700 (CA)**

The Addis decision was reaffirmed. Anthony Rex Bliss, a consultant orthopaedic surgeon, fell out with a colleague and wrote him some offensive letters. The Health Authority thought he might be mad, and required him to undergo a psychiatric examination. When he refused, he was suspended. The Health Authority later conceded that he had no mental or pathological illness, and invited him to resume his duties. He claimed that his contract had been repudiated and claimed damages *inter alia* for his frustration, mental distress, injured feelings and annoyance.

HELD: The Court of Appeal confined liability for distress to cases where comfort, pleasure or 'peace of mind' were the central features of the contract.

"In Cox v. Philips, Lawson J. took the view that damages for distress, vexation and frustration, including consequent ill-health, could be recovered for breach of a contract of employment if it could be said to have been in the contemplation of the parties that the breach would cause distress. For my part, I do not think that that general approach is open to this court unless and until the House of Lords has reconsidered its decision in the Addis case." per Dillon L.J. p.718

82.5 ***Hayes v. James and Charles Dodd*** **[1990] 2 All ER 815 (CA)**

The owner of a motor repair business bought premises in Tenterden, having been assured by his solicitors that there was a right of way over the land at the rear of the premises. There was no such right of way, and without access to the back of his workshop, the plaintiff's business failed. He claimed, *inter alia*, for the anguish and vexation caused by his troubles. The court awarded him £1,500 for his distress, but the Court of Appeal overturned this.

"I am not convinced that it is enough to ask whether mental distress was reasonably foreseeable as a consequence, or even whether it should reasonably have been contemplated as not unlikely to result from a breach of contract. It seems to me that damages for mental distress in contract are, as a matter of policy, limited to certain classes of case... It should not, in my judgment, include any case where the object of the contract was not comfort or pleasure or the relief of discomfort, but simply carrying on a commercial activity with a view to profit." per Staughton L.J. at p.823

82.6 There are, however, two exceptions to this rule:

i. Where the purpose (or a substantial purpose) of the contract is to provide pleasure and enjoyment (*Jarvis v. Swan's Tours* [1973] and *Farley v. Skinner (no.2*) [2001]

ii. Where the mental distress relates directly to some physical discomfort caused by the breach (*Hobbs v. L & S W Ry. Co.* (1875)

83 DISTRESS CAUSED BY PHYSICAL INCONVENIENCE

83.1 Compensation for distress can be obtained where the breach of contract has led to physical inconvenience.

83.2 ***Hobbs v. London & South Western Railway Co. L.R.*** **(1875) 10 QB 111**

A family was put off a train at the wrong station late at night and suffered a five-mile walk home. It was held that they could be compensated for their distress at this as it was linked to their physical inconvenience.

83.3 ***Watts v. Morrow*** **[1991] 1 WLR 1421 (CA)**

The purchasers of the defective house claimed damages for distress from the negligent surveyor. It was held that they were not entitled to them, but they were awarded £750 each for their physical discomfort. Bingham L.J. summarised the law.

"A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

"But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

"In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such." per Bingham L.J. at p.1445

84 CONTRACTS FOR ENJOYMENT

84.1 In ***Jarvis v. Swan's Tours Ltd.*** **[1973],** Lord Denning held that damages for distress could be awarded where the contract was one for enjoyment, such as a holiday or a theatre trip. Although he invented this rule, it has since been accepted – and even extended – by the higher courts.

84.2 ***Jarvis v. Swan's Tours Ltd.*** **[1973] QB 233 (CA)**

Jarvis, a solicitor from Barking, booked a two-week skiing holiday in Mörlilp, Switzerland. The brochure issued by Swan's Tours included the following attractions:

"Why did we choose the Hotel Krone? Mainly and most of all because of the friendly welcome you will receive from Herr and Frau Weibel...The Hotel Krone has its own Alphűtte Bar which will be open several evenings a week... No doubt you will be in for a great time, when you book this House-Party holiday... Mr. Weibel, the charming owner, speaks English... All these House-Party arrangements are included in the price of your holiday. Welcome party on arrival. Afternoon tea and cake for 7 days. Swiss dinner by candlelight. Fondue party. Yodler evening. Chali farewell party in the Alphűtte Bar. Service of representative."

The holiday did not turn out to be quite as described. There were only 13 people there when he arrived, and they all left by the second week, so he was a having a House Party alone. The nice Swiss cakes turned out to be potato crisps and dry nut cakes; the yodler was a local man who came in his working clothes and just sang a few songs very quickly; the bar was only open one evening; the representative left after a week; and nobody in the hotel spoke English, except for Jarvis. Even the skiing was so badly organised that it had to be abandoned!

The holiday had cost £63.45. The trial judge awarded Jarvis £31.72 in damages, taking no account of his distress. The Court of Appeal held that he was entitled to substantial damages for his disappointment and mental distress, and increased his damages to £125.

"In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities. Take the present case. Mr. Jarvis has only a fortnight's holiday in the year. He books it far ahead, and looks forward to it all that time. He ought to be compensated for the loss of it.

"A good illustration was given by Edmund Davies L.J. in the course of the argument. He put the case of a man who has taken a ticket for Glyndbourne. It is the only night on which he can get there. He hires a car to take him. The car does not turn up. His damages are not limited to the mere cost of the ticket. He is entitled to general damages for the disappointment he has suffered and the loss of the entertainment which he should have had." per Lord Denning M.R. at p.237

84.3 ***Jackson v. Horizon Holidays Ltd.*** **[1975] 3 All ER 92 (CA)**

Following the Jarvis case, Lord Denning permitted an additional award of £500 for the mental distress caused to a family during a disastrous holiday. This was particularly odd as he permitted the father of a family to claim not only for his own distress, but for that of his wife and children, even though they were not privy to the contract.

84.4 ***Ruxley Electronics and Construction Ltd. v. Forsyth*** **[1995] 3 WLR 118 (HL)**

The House of Lords upheld an award of £2,500 to a man whose swimming pool was built one and a half feet too shallow, to compensate him for his "loss of a pleasurable amenity".

84.5 The series of cases involving ruined holidays and the issue of quantifying distress were considered by the Court of Appeal in ***Milner v. Carnival plc (t/a Cunard)*** **[2010] 3 All ER 701.**

Milner v. Carnival plc (t/a Cunard) **[2010] 3 All ER 701 (CA)**

Mr and Mrs Milner booked a 106-day holiday on the maiden world cruise voyage of the Queen Victoria for £59,052. This included accommodation on a princess grade cabin. Due to faulty construction, the floor plates of the cabin flexed and vibrated in stormy seas, making such a terrible noise that the couple were unable to sleep. They were offered alternative accommodation in a much lower grade and smaller cabin with no natural light which they took for several days, when they were offered temporary accommodation in a higher grade cabin than the one they had booked. However, they had to leave that cabin when the ship docked in Los Angeles, and were compelled either to go back to the lower grade cabin or the noisy one they had actually booked. After 28 days of the cruise, they disembarked in Hawaii, stayed six weeks in Honolulu, and then made their way back to England on The Queen Elizabeth II at an additional cost of £13,440.

They were refunded £48,270 by the defendants, but made a further claim for:

i. Diminution in value of their holiday (£8,000)
ii. Distress and disappointment (£50,000)
iii. Wasted expenditure by Mrs Milner on a wardrobe of evening gowns bought especially for the voyage, but which she could now not face wearing (£4,300)
iv. Cost of the return journey (£13,440)

The trial judge made the following award:

i. Diminution in value of their holiday (£2,500 each)
ii. Distress and disappointment (£7,500 each)
iii. Wasted expenditure by Mrs Milner on a wardrobe of evening gowns bought especially for the voyage, but which she could now not face wearing (£2,000)
iv. Cost of the return journey (£0)

The defendants successfully appealed that the amounts awarded were too high, and the Court of Appeal substituted the following award:

i. Diminution in value of their holiday (£3,500)
ii. Distress and disappointment (£4,000 to Mr. Milner and £4,500 to Mrs Milner)
iii. Wasted expenditure by Mrs Milner on a wardrobe of evening gowns bought especially for the voyage, but which she could now not face wearing (£0 as this was covered by the award for distress)
iv. Cost of the return journey (£0)

In assessing an appropriate amount for damages for distress, the court emphasised the need for consistency between the cases, whilst acknowledging that this could be a difficult exercise as the facts of cases varied so much.

Ward L.J., first rejected the *obiter* of Gage J. in *Keppel-Palmer v. Exus Travel* [2003] EWHC 3529 who thought that poor people should get higher damages for distress than rich ones for a ruined holiday because they do not get as many. (para 35). He then continued:

"One place to look is to trace the awards given in holiday cases. As I have already pointed out at [35] above, this is not a particularly fruitful exercise because the facts of one case will be infinitely different from the facts of the next. For what it is worth, counsel's diligent analyses tend on the whole to show rather low awards. One of the highest for a ruined honeymoon was only £4,406, adjusted for inflation.

The award in Jarvis is worth £1,885 today and in Jackson £4,101 for the family of five and in Keppel-Palmer £3,499 for the party of six adults. Factors which will have a bearing on the amount of damages awarded in individual cases include the type of holiday so that a special occasion, such as a honeymoon, is likely to attract more damages than for an ordinary annual package holiday. Mr Christopher Lundie, for the appellant, gathered the known holiday cases in categories which show that the highest awards (£4,406–£4,360) were to couples whose plans to marry abroad were wrecked; the disappointed honeymooners received from £321–£1,890; for other special holidays the range was £264–£1,161 and the run of the mill ruined holiday attracted between £83 and £1,876. The nature of the breach will matter: the sports fanatic denied his sporting facilities will suffer more disappointment than his wife who is perfectly happy on a sunbed by the side of a pool. Thus, the features of the holiday which were regarded as the primary features will make a difference." per Ward L.J.at para 37

Considering these precedents, and also those from cases about sex and race discrimination, Ward L.J. noted that this was an exceptional, once-in-a-lifetime, luxury holiday where expectations were very high and so disappointment likely to be very severe. Even so, he considered the amount awarded by the trial judge to be excessive and disproportionate.

85 EXTENSION OF DAMAGES FOR DISTRESS

85.1 The leading case on damages for distress is now ***Farley v. Skinner (No.2)*** **[2002],** in which the House of Lords extended Denning's rule.

Farley v. Skinner (No.2) **[2002] 2 AC 732 (HL)**

Farley was planning to buy Riverside House in East Sussex as a weekend retreat. He hired Skinner to survey the property and as the house was within 15 miles radius of Gatwick, he particularly asked him to check whether the property would be affected by aircraft noise. In his report, Skinner wrote the following: "You have also asked whether the property might be affected by aircraft noise, but we were not conscious of this during the time of our inspection, and think it unlikely that the property will suffer greatly from such noise, although some planes will inevitably cross the area."

In fact, there was a navigation beacon near the house, which should have indicated to the surveyor that there would be quite a lot of air traffic - which there was. The High Court judge awarded Farley £10,000 for his discomfort. Referring to *Watts v. Morrow* he said: *"It seems to me that the interference was very much less than the real discomfort that has been sustained by Mr. Farley in this case."*

The Court of Appeal overturned this. They said that the aircraft noise did not amount to physical discomfort in the sense of *Watts v. Morrow*. Nor was this a contract for 'peace and enjoyment' in the *Jarvis v. Swan's Tours* sense.

"Nor can I accept the argument that because the claimant hears the noise through his ears and therefore experiences it through his senses, this amounts to physical discomfort. Persistent high levels of noise can cause physical discomfort, indeed it is a well known form of torture...but there is nothing approaching that here." per Stuart-Smith L.J. at para 17

The House of Lords however restored the original judgment and permitted Farley's claim. It is not necessary for a contract to be exclusively one for enjoyment to give rise to damages for distress. It is enough that pleasure is a major object. Furthermore, the fact that Farley remained in the property would not defeat the claim as it was perfectly reasonable for him to make the best of a bad job.

The damages figure of £10,000 was considered to be at the top end of what was appropriate, but the House of Lords did not interfere with it.

"There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind."

per Lord Steyn at para 24

85.2 The awards for loss of amenity or distress are not generally very high.

***Herrmann v. Withers LLP* [2012] EWHC 1492 (Ch)**

In 2008 the claimants, Mr Jeffrey Herrmann and his wife Mrs Mina Gerowin Herrmann, bought a £6.8 million house at 37 Ovington Square in Knightsbridge, having been wrongly advised by their solicitors that his would give them the benefit of a statutory right to use the communal garden in Ovington Square. They claimed £50,000 for their loss of amenity and enjoyment, anxiety and disappointment. They got just £2,000.

"In the circumstances, I have concluded that I should award damages for loss of amenity and disappointment. On the other hand, I do not think I should award anything like the £50,000 suggested. As already mentioned, it is apparent from Farley v Skinner that awards should be modest. Relatively small sums have, moreover, been awarded in respect of matters at least as serious as the loss of amenity and disappointment the Herrmanns have experienced." Newey J. at para 129

86 *FARLEY v. SKINNER* (No. 2) APPLIED

86.1 ***Hamilton Jones v. David & Snape* [2004] 1 WLR 924**

The mother of twin boys was concerned that their father might attempt to remove them to his native Tunisia after the breakdown of their marriage. She hired the defendant solicitors to help prevent this. The solicitors obtained prohibited steps orders and notified the passport agency, asking it not to issue passports for the boys. The passport agency agreed not to do this for a year. After the year, the solicitors forgot to ask the passport office to continue the prohibition, the father got passports for the boys and took them to Tunisia. The mother claimed, *inter alia*, for the mental distress she was caused by this breach of contract by the solicitors.

It was held that she was entitled to damages for her distress. The issue was whether this claim fell within the exceptional category of breach of contract claim where damages for mental distress were permissible on the basis that an important part of the contract was securing pleasure or peace of mind. Given that the main reason for hiring the solicitors was for the mother to have peace of mind that she would retain custody of the children, the contract fell within this category and she was entitled to damages for distress.

86.2 ***Jonathan Yearworth v. North Bristol NHS Trust* [2009] 3 WLR 118 (CA)**

Six men who were undergoing chemotherapy for cancer, produced sperm samples to be preserved by the defendant in case the treatment made them infertile. Due to the negligence of the defendant in not keeping the sperm frozen, it perished, and the claimant men suffered from PTSD. (Three of them later recovered their fertility; one was shown to be unlikely to have been able to father a child anyway; and one died!)

There were several issues arising from this case, including the question of whether a man can claim ownership of his sperm once it has been ejaculated! The Court of Appeal held that in these circumstances the men did continue to own their sperm, and so the NHS Trust had destroyed their property in breach of a bailment. On that basis, and applying the distress principles in the contract cases such as *Farley v. Skinner*, the claim was allowed.

87 *FARLEY v. SKINNER* (No. 2) DISTINGUISHED

87.1 ***Siddiqui v. James and Charles Dodd (A Firm)* [2006] EWHC 1295**

The claimants operated a private medical business at premises known as 'The Mini Hospital' in Charlton, London. They were registered under the Registered Homes Act 1984 to carry out 37 specified medical operations under local anaesthetic. Their registration was cancelled by order of the magistrates' court when an inspection revealed various problems such as a lack of oxygen and emergency equipment on the premises and an operating theatre that was less than half the required size. They wished to appeal this decision to the Registered Homes Tribunal, but due to the contractual negligence of their solicitor, the appeal was not lodged in time.

Siddiqui sued their solicitor, claiming that they had lost the opportunity of overturning the order; their investment in the business was wasted; and they had lost the opportunity of developing a business which would have prospered. They also claimed damages for distress and disappointment. In fact, on the evidence it was highly unlikely that the tribunal would have permitted the claimants to continue their practice without making considerable improvements to the facilities, which would clearly be beyond their means to provide. Thus, there could be no substantial damages for loss of business. Furthermore, no damages were available for distress, as it could not be said that a major part of the contract with the solicitors was to secure pleasure, relaxation or peace of mind.

"As a proposition of common sense, it is easily foreseeable that the loss of opportunity to argue the appeal could cause distress and disappointment even if not anxiety and humiliation. But decided law does not measure recoverability in terms merely of forseeability. In Watts v Morrow [1991] 1 WLR 1423 Bingham LJ stated damages for distress should only be awarded where "the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation".

"This was adopted by the House of Lords in Johnson v Gore Wood and Co (A Firm) [2001] 2WLR 72. In Farley v. Skinner (No.2) the House of Lords held it was sufficient if a major or important part of the contract was to secure pleasure, relaxation or peace of mind. I do not consider it can be said in the present case that a major or important part of the Defendants retainer was to secure pleasure, relaxation or peace of mind, although such emotions might have followed had the appeal been heard and been successful as might have distress and disappointment had the appeal failed. In my judgement damages are not recoverable under these heads on the basis of the retainer and the facts of this case. Had I been able to take a different view my award to Mr Siddiqui would have been very modest."

per John Leighton Williams QC, at para 116

87.2 It is not possible to claim damages for distress on behalf of a company. Only 'real' people can suffer!

***Regus (UK) Limited v. Epcot Solutions Limited* [2007] EWHC 938 (Comm)**

Regus rented serviced office accommodation to Epcot, for use as an IT training centre. In breach of contract, the offices did not have functional air conditioning, as a result of which the rooms were either very hot or very cold. (Sound familiar?) Epcot claimed for "loss of profits and loss of opportunity to develop its business to generate anticipated profits and distress and inconvenience and loss of amenity." Regus claimed that the loss of profits and loss of opportunity were not recoverable because of an exemption clause in their standard contract, and that the other loss claimed could not be recovered as Epcot was a company rather than a natural person.

When the judge pointed out that this would mean that Regus were accepting no liability for their breach at all – which was likely to make the exemption clause unreasonable under s.3 UCTA 1977 – they back-tracked and claimed that the damages for distress could be recoverable under the principle on *Ruxley Electronics*! The judge disagreed with this wide interpretation of Ruxley.

"As I read the decision however the House of Lords when reversing the decision of the Court of Appeal to overturn the judgment of the Mercantile Judge also upheld , for the most part in passing, an award of damages of £2,500 for loss of the pleasurable amenity (i.e. fun) of a swimming pool. This was on the basis that the contract was one to provide pleasure and amenity analogous to Jarvis and the holiday cases, and thus very different from the business purpose of the contract in this case. Epcot does not however appear to claim damages for loss of any subjective or idiosyncratic pleasure or amenity and it would be unusual, if not impossible for a company to do so. For the most part a company's advances and setbacks are measured in financial terms." per HH Judge MacKie QC at para 48

VIII: METHODS OF LIMITING DAMAGES

88 MITIGATION OF LOSS

88.1 As discussed above, there may be a duty on the claimant to mitigate loss where it is reasonable to do so.

88.2 However, it would seem that there is no duty on claimants to accept an anticipatory breach, even if by continuing with the contract they will be incurring unnecessary expense. This principle comes from the much-criticised majority decision in ***White and Carter (Councils) Ltd. v. McGregor*** **[1962].**

White and Carter (Councils) Ltd. v. McGregor **[1962] AC 413 (HL: Scotland)**

McGregor, the defender, carried on a garage in Clydebank and in 1954 made an agreement with the pursuers under which they displayed advertisements of his business on a number of litter-bins. In 1957, McGregor's sales manager renewed this contract without express authority, and so, on that very day, McGregor wrote to the pursuers to cancel the order. The pursuers refused to accept this repudiation, and proceeded to print advertisements and attach them to litter-bins. McGregor refused to pay on the grounds that it was unreasonable of the pursuers to incur expenses on his behalf when he had expressly told them not to do so. HELD: The pursuers were able to recover the contract price in full.

"If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect...

"The respondent points out that in most cases the innocent party cannot complete the contract himself without the other party doing, allowing or accepting something, and that it is purely fortuitous that the appellants can do so in this case. In most cases by refusing co-operation the party in breach can compel the innocent party to restrict his claim to damages. Then it was said that, even where the innocent party can complete the contract without such co-operation, it is against the public interest that he should be allowed to do so...

"It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way. One reason why that is not the law is, no doubt, because it was thought that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to allow a party to enforce his full rights under a contract." per Lord Reid p.430

88.3 This case was distinguished by Lord Denning in ***The Puerto Buitrago*** **[1976] 1 Lloyd's Rep 250 CA,** who cited Cheshire and Fifoot's assertion that it was a "grotesque" result and should only be followed in a case that is "precisely on all fours with it."

89 BENEFITS ACCRUING

89.1 If the breach has caused the claimant an incidental benefit, the value of that benefit might be deducted from the damages awarded.

British Westinghouse Co. Ltd. v. Underground Electric Railways Co of London Ltd. **[1912] AC 673 (HL)**

A agreed to supply B with turbines of a stated efficiency but supplied less efficient ones, which use more coal. B accepted them and used them, reserving the right to claim damages. After some years, and before A's turbines were worn out, B replaced them with others. These were so much more efficient than A's would have been, even in accordance with the contract, that B actually used less coal than he would have done had the original contract been properly fulfilled. The House of Lords stated that B was under no duty to mitigate by buying new turbines. However, as he had bought them in consequence of A's breach, the financial advantage he had gained by using them must be set off against the cost of buying them. As B's savings in coal exceeded the cost of buying them, he recovered nothing in respect of it. However, he could recover for the loss suffered before replacing the turbines.

See also *Omak Maritime Ltd. v. Mamola Challenger Shipping Co.* [2010] EWHC 2026 (Comm)

90 CONTRIBUTORY NEGLIGENCE

90.1 Under the Law Reform (Contributory Negligence) Act 1945, damages for negligence can be reduced if the claimant has made the matter worse by his own negligence.

90.2 The question arises as to whether this would also apply to a breach of contract. The answer seems to be that where there is concurrent liability in tort and contract, the Act will be applied, but where there is only strict liability in contract, it will not.

90.3 ***Forsikringsaktieselskapet Vesta v. Butcher*** **[1988] 2 All ER 43 (CA)**

A Norwegian insurance company (Vesta) insured the owners of a Norwegian fish farm against loss of fish, and reinsured 90% of the risk with Lloyds underwriters through brokers. It was a condition of both the insurance and reinsurance policies that a 24-hour watch should be kept on the fish, but the owners, realising that they could not comply with this condition, told the insurers that they could not accept the clause. The insurers told the brokers, but the broker s did not tell the reinsurers, and the insurers did not pursue the matter.

Following a storm, many of the fish were lost, and the insurers settled the claim with the fish-farm. When they attempted to claim their 90% from Lloyds, Lloyds claimed that the reinsurance policy was void as the farmers had not complied with the 24-hour watch. Vesta sued the brokers for breach of their duty to inform Lloyds about the change in the policy, but the brokers claimed that Vesta were contributorily negligent for not following up the matter. Vesta said that contributory negligence was not applicable to a contract.

HELD: Lloyds could not resist the claim on the basis of the lack of a 24-hour watch, as this clause was governed by Norwegian law, which would not permit their defence. Thus, Lloyds were liable and the brokers were not. However, the Court of Appeal said *obiter* that where a defendant's liability in contract was the same as his liability in the tort of negligence, independently of the existence of any contract, the court did have the power to apportion damages under the 1945 Act, even if the claim was made in contract. Thus, if substantial damages had been awarded against the brokers, they would have been reduced because of Vesta's own negligence.

90.4 ***Barclays Bank plc v. Fairclough Building Ltd.*** **[1994] 3 WLR 1057 (CA)**

FB Ltd. undertook to carry out maintenance work at warehouse premises occupied by Barclays. The asbestos cement roofs were cleaned with high-pressure water jets, which resulted in the spread of asbestos fibres around the building. In doing this, FB was in breach of a condition of the contract, which specified that the work should be done in accordance with The Control of Asbestos at Work Regulations 1987, which it was not. FB claimed that Barclays had been contributorily negligent in that its own safety officer and architect had condoned the method of work adopted.

HELD: Although a defendant may claim contributory negligence if the liability for the breach is coextensive with a similar liability in tort, on a claim for damages founded on a breach by the defendant of a strict contractual liability arising independently of any negligence on his part, the contract had to be construed as excluding the operation of the 1945 Act. In this case, the obligations undertaken by the contractor under the terms of the contract required strict performance and did not impose any duty on the plaintiffs to prevent breaches. Therefore, the Act did not apply, and the plaintiffs could claim in full.

90.5 ***Trebor Bassett Holdings Ltd. v. ADT Fire and Security pl*****c [2011] BLR**

Although the judge did not consider that TB's lack of fire-safety procedures or their incompetence in fire-fighting broke the chain of causation, they did amount to contributory negligence to reduce the damages by 75%.

"In my view, the events as they unfolded in this case make pretty sorry reading. There is an all-pervasive feeling that, time after time, the claimants simply failed to measure up to their responsibilities and failed to take the repeated opportunities that they were given to address the problems. In those circumstances, the three specific alleged defaults in respect of fire segregation, sprinklers and manual training are not isolated or out-of-character events, but merely three aspects of an overall and repeated systemic failure."

per Coulson J. at para 578

91 TAXATION

91.1 The value of the claimant's loss may be affected by taxation. If, for example, the claimant is awarded a sum to represent his gross lost earnings, this will be reduced by the amount of tax he would hypothetically have had to pay on it. In

91.2 ***B.T.C. v. Gourley*** **[1956] AC 185 (HL)**

Gourley, an eminent civil engineer, was injured in a railway accident and permanently disabled. He was awarded £37,720 for his lost future earnings, but this award was reduced to a mere £6,695 to take account of the hypothetical taxation! This is commonly known as the "Gourley Deduction".

92 SUPERVENING EVENTS

92.1 If the effect of the defendant's breach is subsumed by some later disaster which befalls the claimant before the award of damages, the damages will only be assessed up to the time of the supervening event. (cf. *novus actus interveniens* in negligence.)

92.2 ***Beoco Ltd. v. Alfa Laval Co. Ltd.*** **[1994] 4 All ER 464 (CA)**

The defendants installed a faulty heat exchanger system at the premises of the plaintiff. The plaintiff employed a second engineer to fix the fault in the system, and without checking the repair, the plaintiff switched it on. In fact the repair was faulty too, and two months later the whole thing exploded! The plaintiff claimed damages from the defendants for the cost of replacing the original heat exchanger and the consequent loss of profits that would inevitably have been incurred, had they not brought the second engineer in to perform the botched repair job and had the subsequent explosion.

HELD: The cause of the explosion had been the plaintiff's own negligence in failing to carry out proper tests before using the repaired heat exchanger, and he was not entitled to recover damages from the defendant by way of the hypothetical loss of profit which he would have incurred as a result of the defendant's breach of contract had not the supervening event caused greater damage.

93 LIMITATION ACT 1980

93.1 The Limitation Act 1980: The right to sue for breach of contract generally becomes statute-barred after 6 years from the date of the breach (or l2 years if the contract is by deed.) If the defendant conceals his breach by fraud, the time begins to run when the claimant discovers, or should reasonably have discovered, the fraud. The period may be extended or revived by written acknowledgement of the breach by the defendant.

93.2 **s.5 Time limit for actions founded on simple contract.**

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

s.8 Time limit for actions on a specialty.

An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

PART SIX: EQUITABLE REMEDIES

94 INTRODUCTION

94.1 There are various equitable remedies for a breach of contract. The purpose of them was summarised by Lord Nicholls in ***Attorney General v. Blake*** **[2001] 1 AC 268 (HL)**

94.2 ***Attorney General v. Blake*** **[2001] 1 AC 268 (HL)**

"It is…well established that an award of damages, assessed by reference to financial loss, is not always "adequate" as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate.

The classic example of this type of case, as every law student knows, is a contract for the sale of land. The buyer of a house may be attracted by features which have little or no impact on the value of the house. An award of damages, based on strictly financial criteria, would fail to recompense a disappointed buyer for this head of loss. The primary response of the law to this type of case is to ensure, if possible, that the contract is performed in accordance with its terms. The court may make orders compelling the party who has committed a breach of contract, or is threatening to do so, to carry out his contractual obligations. To this end the court has wide powers to grant injunctive relief. The court will, for instance, readily make orders for the specific performance of contracts for the sale of land, and sometimes it will do so in respect of contracts for the sale of goods. In Beswick v Beswick [1968] AC 58 the court made an order for the specific performance of a contract to make payments of money to a third party. The law recognised that the innocent party to the breach of contract had a legitimate interest in having the contract performed even though he himself would suffer no financial loss from its breach. Likewise, the court will compel the observance of negative obligations by granting injunctions. This may include a mandatory order to undo an existing breach, as where the court orders the defendant to pull down building works carried out in breach of covenant." per Lord Nicholls at p.282

95 ACTION FOR AN AGREED SUM

95.1 Where the contract stipulates for an agreed sum to be paid in exchange for some performance, the claimant may sue for the specific enforcement of the promise to pay.

95.2 This differs from damages, as no question of quantification or remoteness arises. It is akin to specific performance. If the defendant can prove that the claimant should have mitigated his loss, then the action is not available, and the claimant must sue for damages instead. Where the agreed sum is not paid and the claimant suffers additional loss, he may sue for both the agreed sum and damages.

96 SPECIFIC PERFROMANCE

96.1 This is an order of the court that the parties carry out their obligations. It is an equitable remedy, and will not usually be available if either:

1. Damages are an adequate remedy; or
2. The court would have to supervise the performance over a period of time to ensure compliance; or
3. It would cause undue hardship on the defendant; or
4. Only one of the parties is eligible for an award of specific performance (e.g. contracts cannot be specifically enforced against minors); or
5. The claimant has not himself acted equitably (with 'clean hands'); or
6. The order would be for someone to perform personal services.

97 INJUNCTION

97.1 This is an order of the court that a person be restrained from acting in a way which would be a breach of contract. The courts will not allow an injunction to be used as an indirect way of specifically enforcing a service contract (though you might think that is exactly what happened in ***Warner Bros. Pictures v. Nelson*** **1937)**

97.2 ***Warner Bros. Pictures Incorporated v. Nelson*** **[1937] 1 KB 209**

The injunction against Bette Davies working for another company was granted. The contract did not prevent her from doing any work: she just could not be an actress.

"The case before me is, therefore, one on which it would be proper to grant an injunction unless to do so would in the circumstances be tantamount to ordering the defendant to perform her contract or remain idle or unless damages would be the more appropriate remedy... The defendant is stated to be a person of intelligence, capacity and means, and no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line. She will not be driven, although she may be tempted, to perform the contract, and the fact that she is so tempted is no objection to the grant of an injunction." per Branson J. at p.220

97.3 ***Page One Records v. Britton*** **[1967] 3 All ER 822**

The Troggs (a pop group) employed Page One Records Ltd. as their manager under a contract that specified that they would not engage any other person to act as agent or manager for them. When they fell out with POR, the Troggs wished to dispense with their services, but POR sought an injunction to stop them from hiring anyone else. It was found as a fact that The Troggs needed to have a manager to succeed in the business.

HELD: An injunction would compel The Troggs to continue to employ POR, and would thus amount to enforcing a contract for personal services. It was accordingly refused.

98 DAMAGES IN LIEU OF AN INJUNCTION OR SPECIFIC PEFORMANCE

98.1 ***Attorney General v. Blake*** **[2001] 1 AC 268 (HL)**

"I must also mention the jurisdiction to award damages under section 2 of the Chancery Amendment Act 1858, commonly known as Lord Cairns's Act. This Act has been repealed but the jurisdiction remains. Section 2 empowered the Court of Chancery at its discretion, in all cases where it had jurisdiction to entertain an application for an injunction or specific performance, to award damages in addition to or in substitution for an injunction or specific performance. Thus section 2 enabled the Court of Chancery, sitting at Lincoln's Inn, to award damages when declining to grant equitable relief rather than, as had been the practice since Lord Eldon's decision in Todd v Gee (1810) 17 Ves 273, sending suitors across London to the common law courts at Westminster Hall.

"Lord Cairns's Act had a further effect. The common law courts' jurisdiction to award damages was confined to loss or injury flowing from a cause of action which had accrued before the writ was issued. Thus, in the case of a continuing wrong, such as maintaining overhanging eaves and gutters, damages were limited to the loss suffered up to the commencement of the action: see Battishill v Reed (1856) 18 CB 696. Lord Cairns's Act liberated the courts from this fetter. In future, if the court declined to grant an injunction, which had the effect in practice of sanctioning the indefinite continuance of a wrong, the court could assess damages to include losses likely to follow from the anticipated future continuance of the wrong as well as losses already suffered. The power to give damages in lieu of an injunction imported the power to give an equivalent for what was lost by the refusal of an injunction."

per Lord Nicholls at p.281

TUTORIAL QUESTIONS

MISREPRESENTATION

1. Keaton is a medical researcher who is developing a piece of computer software to enable instant testing for the coronavirus, simply by scanning a person's forehead with a hand-held machine. He needs extra funding for the clinical trials, and sets up a private limited company to raise money from investors. He approaches Max, the wealthy owner of a chain of supermarkets, who he knows is interested in diversifying his investment portfolio.

   Keaton tells Max: "This is a greatest breakthrough in medical science since penicillin. No government in the world will be able to resist buying the software."

   Keaton also tells Max that he has sent a preliminary report to the Chairman of the Royal Society of Virologists, and that he had replied: "An incredible piece of software… a brilliant scientist."

   In fact, what the Chairman said was: "This would truly be an incredible piece of software if it did what you claim. It is physically and biologically impossible to detect a virus in the way that you are proposing. You do not need to be a brilliant scientist to know that: just ask a first-year medical student!"

   Max said that he was very impressed by this response, but did not ask to see the report.

   Keaton also told Max that he intended to present a paper about his research at the prestigious Medical Science Conference, which would be bound to increase interest in the software. This was true, but Keaton's proposed paper was rejected by the conference organisers as being total nonsense, so he was not able to present it. He did not tell Max about this rejection.

   Max invested £500,000 by buying shares in Keaton's company. When the proposed software proved to be impossible to develop, the shares became worthless.

   Advise Max who wishes to claim from Keaton for misrepresentation.

2. John is a research chemist who has developed a new vitamin supplement for men. He established a private company to develop and market this product, and approached Rachel to invest in the project.

He told Rachel that this was: “the most exciting product of its type ever to hit the market.” In fact, it had not, at that time, been marketed at all.

He also told Rachel that he had sent a sample of the vitamin supplement to David Beckham who had written to say that it was an excellent product which he would happily endorse. This was true, but the David Beckham in question was John’s elderly cousin rather than the famous football player.

John commissioned an independent report into the viability of the product. The report stated that the men’s vitamin market was flooded with very similar products and that John’s company could expect to suffer a loss of at least £200,000 in the first year of production. John amended this report to suggest that the stated projected loss was a projected profit. He offered the report to Rachel for her inspection, but she said that she did not understand accounts and was happy to take John’s positive summary of it in good faith.

John told Rachel that he intended to offer free supplies of the product to various major health clubs for them to offer as raffle prizes. Rachel was impressed by the amount of publicity that this would generate. John then discovered that none of the health clubs he had approached would contemplate offering his product to its members. He did not tell Rachel about this rejection.

Rachel invested £100,000 in John’s project by purchasing shares in his company. Six months later, the company went into insolvent liquidation and Rachel’s shares became worthless.

Advise Rachel of her rights and remedies, in any, in the law of misrepresentation.

3. Melania has designed a device to enable a car driver to rotate all his wheels through 90%, thus enabling him to park sideways in a small space. She has a small working-model of the car, but she needs £100,000 to build a full-sized prototype, and she writes to the Ford Motor Company to ask for sponsorship.

   The chairman of Ford replies: "The idea is fabulous, of course, but not, alas, original. We have tried to develop such a device ourselves, but it can only work if the chassis of the car can be lifted beyond the height of the wheel axis, which is entirely impractical and tends to cause the car to collapse under its own weight. A billion-dollar certainty for sure – but that's going to be the loss, not the profit!"

   Undeterred, Melania puts the idea to Donald who runs a development company. She tells Donald that her invention is a "sure-fire thing" and that "everyone will want one."

   She also tells him that she has offered the idea to Ford, who are thinking about it. She adds that the chairman of Ford has said: "The idea is fabulous… a billion-dollar certainty."

   She shows Donald the working model and Donald is very impressed. Donald asks whether there will be any technical problems in scaling it up to a full-sized car. Melania says that she is sure there will be no problems, but tells Donald that he can take the model away to have it analysed by his own expert if he wants. Donald declines the offer, saying that he is happy to trust Melania.

   Melania also tells Donald that she intends to book an exhibition stand at the highly prestigious Royal Motor Show in a few months' time to publicise the invention. Melania then receives a letter from the organisers of the Royal Motor Show telling her that they are unable to reserve a spot for her invention because, according to the Highways Act 2018, it is now illegal to exhibit motor products that have not received a safety licence, which hers has not. Melania does not tell Donald about this.

   Donald invests £100,000 in the project, but when the prototype is built it collapses under its own weight. The project is abandoned.

   Advise Donald as to any claims he may have against Melania for misrepresentation.

4. Jack, a cattle merchant, was seeking to diversify his investments. He read the following advertisement in the well-respected business journal The Financial World:

"From small beans giant shoots will grow! Dr. Dodgy Peddler is seeking new investors for an exciting GM food project. He has recently developed a new strain of runner bean that could not only mature twenty times as quickly as the standard bean, but which might send beanstalks growing up into the sky. This might well be the solution to world famine and for as little as £250,000 you could obtain a 10% share of the action and the profits."

Jack was very interested in this advertisement, and wrote to Dr. Peddler for more information.

Peddler told Jack that the new strain of beans was about to go into full production, and that a market assessment report stated that there was potential for a 700% payback on any investment within the first year. There was such a report, but Peddler omitted to mention that it had been prepared by his 8-year-old son as part of a school project, which he had failed. Jack did not ask to see the report, though had he done so, the source of it would have been obvious.

Peddler also told Jack that he intended to set up regional headquarters in 10 specified famine-prone areas of the world to maximise the distribution potential of the beans. This was true, but on investigation of the practicalities and expense of such a scheme, he decided to base all his operations in Milton Keynes. Peddler did not inform Jack of this change of plan.

Jack then bought a 10% share of the venture from Peddler for £250,000, even though this meant that he had to sell some of his cows to raise the capital.

Shortly afterwards, the beans were proven by independent research to be no more effective as food-stuff than ordinary beans. Jack's 10% share became virtually worthless.

Advise Jack, who wishes to sue Peddler for Misrepresentation.

5. Andy Spider is a composer of musical comedies who has had several shows produced in the West End of London. He had written a new show called 'Brexit: the Musical!", and was seeking backers for an extravagant production of it. He established a private company to develop and market the show, and approached Tessy May to invest in the project. May is a career politician with no knowledge of the theatre business.

Spider told May that: "This show is a sure-fire smash! We will be singing the hits all the way to the bank!"

He also told May that he had sent a demonstration recording of the show to an influential theatre critic, and that the critic had replied saying: "An undoubted triumph – an outstanding score and brilliant lyrics."

In fact, what the critic had written was: "In these days of financial uncertainty, there is no such thing as an undoubted triumph in the theatre, even for a show with an outstanding score and brilliant lyrics. Alas, this show has neither of them. I suggest you give up on it at once."

Spider commissioned an independent report into the viability of staging a new show in the West End. The report stated that this would be a most foolish venture in the current economic climate and that the show had very little chance of making any money. Spider told May that the report gave a glowing commendation to the project. However, he did not offer to show her the report and May did not ask to see it.

Spider told May that he had been invited to publicise the new show by appearing as a guest on the popular Graham Thornton show. This was true, but once the producers heard the demonstration recording, they were so appalled by it that the guest appearance was cancelled. Spider did not inform May of this.

May invested £50,000 in Spider's project by purchasing shares in his company. The show opened to a barrage of negative criticism and closed two days later, leaving May's shares worthless.

Advise May of her rights and remedies, if any, in the law of misrepresentation.

FRUSTRATION

6. In order to cash in on the pandemic, Jack decided to set up a business manufacturing personal protective equipment (PPE), to sell to the NSS. He discovered that there was a factory in Kent which was already set up for this, which was let by Kate on a seven-year lease to Len. There were still five years left on the lease, so Jack bought the lease from Len with the consent of Kate, starting on March 1st 2020.

Advise Jack of his contractual position in ALL the following ALTERNATIVE situations. You may assume that there are no relevant exemption, variation or force majeure clauses in any of the contracts.

i) On May 1st 2020, the government announced that henceforth all PPE to be used by the NSS would be manufactured exclusively by the company Cummings and Co. As Jack now has no prospect of making a commercial return on his business venture, he wishes to terminate the lease forthwith.

ii) On April 1st, Mary, who had been hired on a one-year contract as a packing assistant at the factory, was sent to prison for two months for consistently breaching social distancing regulations at her home. Jack wishes to end her contract on the basis of frustration.

iii) On June 1st 2020, Nora ordered 20,000 facemasks from Jack. On the same day, Olly ordered 10,000 facemasks. Both orders are to be delivered by June 10th.

Jack accepted both orders, but then discovered that he only had 20,000 masks in total available. As Nora had placed the larger order, Jack sent all the stock to her, and told Olly that he would have to wait another three months for his order to be despatched.

iv) Jack arranged a promotional evening reception at his factory to be held on March 24th 2020. He hired Peter as the caterer, at an agreed price of £10,000 for a special banquet and decorations, with £3,000 to be paid in advance and the rest after the event. Peter spent £1,000 on the event-specific decorations; and a further £4,000 on food.

Due to the country going into total lockdown on March 23rd, the event had to be cancelled at the last minute.

7. Pat leased a workshop from Rachel for a year from January 1st at a rent of £800 per week in order to manufacture and sell replica guns.

Advise Pat of her contractual position in ALL the following ALTERNATIVE situations.

i. On February 1st, a statute was passed which provided that it would henceforth be illegal to manufacture replica guns. Pat wishes to end her lease.

ii. On March 1st, Pat's assistant, Sonny, who she had hired for a year to help pack the guns into boxes for distribution, was imprisoned for two months for causing a public disturbance in a tea-house. Pat wishes to dispense with Sonny's services permanently.

iii. On May 1st, Pat accepted orders from two retailers, Tess and Unwin for 100 replica rifles each. Pat then discovered that she could only obtain the materials to make 100 replica rifles in total, so she fulfilled Tess's order only.

iv. On June 1st, Vince ordered 2,000 replica machine guns from Pat for £10,000 to be delivered by July 1st. Vince paid Pat £2,000 in advance, with the rest to be payable on July 1st.

v. Pat spent £4000 on materials to make up the order, and delivered the first 1,000 guns to Vince on June 10th.

vi. On June 11th, the warehouse burnt down, destroying all her materials and making it impossible for Pat to complete the order.

8. Barrie decided to set up a private law school in the City of London. To this end, he took a seven-year lease on a six-storey building on Moorgate from Anil, starting on January 1st 2019 at a rent of £10,000 per week.

Advise Barrie of his contractual position in ALL the following ALTERNATIVE situations. You may assume that there are no relevant exemption, variation or force majeur clauses in any of the contracts.

i) Krzys sets up a rival – far superior – Law School on Holloway Road at the same time as Barrie. Because of this, Barrie gets no students enrolling at all. After six months, he wishes to close his Law School and to cancel the lease on the Moorgate building on the basis of frustration.

ii) On April 1st 2019, Barrie's assistant, Amy, who has been hired on a five-year contract as his personal assistant, is sent to prison for six months for causing a disturbance in a public teahouse. Barrie wishes to dispense with Amy's services permanently.

v) On June 1st 2019, Barrie orders 1,000 copies of the textbook 'The Barrie Guide to Contract' from the publishers Sweat and Mixedwell. On the same day, Krzys orders 2,000 copies of the same book from them for his rival Law School.

The publishers accept both orders, but then discover that they only have 2,000 books in total available. As Krzys has placed the larger order, they send all their stock to him, and tell Barrie that his contract has been frustrated.

vi) Barrie arranges a promotional evening reception to welcome the new Prime Minister to the Law School on July 23rd 2019.

He hires Nathalie as the caterer, at an agreed price of £10,000 for a special banquet and decorations, with £3,000 to be paid in advance and the rest after the event. Nathalie spends £1,000 on an ice-sculpture of the Prime Minister, which is put into place on the morning of July 23rd, where it is expected to stay solid for about 24 hours before melting.

Due to terrorist activity in London, the police order the cancellation of the event four hours before it is due to start.

9. Snow White is a clothes designer who specialises in creating fashions for 'the smaller man'. In August 2018, she took a ten-year lease from Doc of a factory hidden in the heart of an English forest. She intended to design and manufacture the clothes at the factory and had chosen this particular location because it would both give her peace and quiet to work on her designs, and would also enable her to keep them secret until they were ready to be marketed.

Discuss the contractual position of Snow White in ALL the following ALTERNATIVE situations:

i) In November 2018, plans were approved to build a large estate of houses right next to the factory, with the building work beginning in January 2019. This created a great deal of noise, which Snow White found to be extremely distracting. It also made it impossible for her to protect the confidentiality of her designs from the passing builders, as the factory had enormous windows, which it was not practical to block up or curtain.

Fearing that the disturbances would increase once the new houses became occupied, Snow White moved out of the factory in January 2018 and claimed that her lease had been frustrated as of that time.

ii) In August 2018, Snow White employed Queenie as a specialist seamstress in the factory on a five-year contract. In September 2018, Queenie was poisoned by a doctored glass of apple-juice at the Magic Mirror Night-Club, and became dangerously ill. The prognosis was that Queenie would probably not be fit to return to work for over a year. Snow White hired Prince in her place, and declared that Queenie's contract had been discharged by frustration.

iii) On September 2nd 2019 Snow White accepted an order from Bashful, who runs a costume shop in Bayswater, for 50 green-felt elf-costumes, to be delivered by December 1st 2019 in time for the Christmas party season. Snow White immediately placed an order with Happy Haberdashers of Hastings for 200 metres of green-felt to make the costumes, to be delivered on September 10th 2019.

On September 5th 2019, Happy informed Snow White that due to a flood at Happy Haberdasher's premises, the green-felt could not be supplied until January 2020. Snow White could not find any alternative suppliers. Snow White did have some green-felt in stock, but decided to use it to fulfil a similar costume order she had from Sneezy. She told Bashful that he would have to wait until January 2020 for his costumes. Bashful threatened to sue Snow White for breach of contract. She counter-claimed that the contract had been frustrated.

iv) On May 1st 2019, Snow White took a booking from Grumpy for a set of seven lavish outfits for him and his friends to wear to the World Cup Opening Ceremony in Moscow in June. Each outfit was to be fashioned from hand-made Belgium lace, at a cost of £1,000 each. The contract specified that £3,000 was to be paid in advance, with the balance of £4,000 to be paid on completion.

In order to fulfil this contract, Snow White purchased £2,000 worth of lace, which she stored at the factory. When the first outfit was completed, she sent it to Grumpy for his approval. Grumpy praised it highly, and Snow White allowed him to keep it so he could start to shop for matching accessories.

Two days later, the factory and all its contents were burnt to the ground by an unknown arsonist. It was now impossible for Snow White to fulfil the order.

10. *"A common mistake, even on the most fundamental matter, does not make a contract void at law: but it makes it voidable in equity."*

per Lord Denning in *Magee v. Pennine Insurance Co. Ltd.* [1969] 2 QB 507

Critically analyse this statement with regard to the judgment in *Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.* [2003] QB 679

11. *"The effect of Solle v. Butcher is not to supplement or mitigate the common law; it is to say that Bell v. Lever Brothers was wrongly decided."*

per Lord Phillips MR in *Great Peace Shipping Ltd. v. Tsavliris (International) Ltd.* [2003] QB 679

Explain and critically discuss this statement.

12. Quentin ran a grocery shop. During the pandemic, he displayed a mannequin in his shop window, wearing a distinctive zebra-striped Hazmat suit. Next to it was a sign which read: "Supporting our heroes in the NSS!"

Ray went into the shop and asked to purchase the suit. Quentin told him that this was a grocery shop, and that the suit was not for sale: it was just there to show support for the NSS workers. Ray falsely told Quentin that he was a nurse, dealing especially with vulnerable people in care homes, and that he needed the suit so he could continue with this work without jeopardising the health of his patients.

Quentin asked him for some proof, and Ray produced an NSS staff card which he had stolen from a real nurse earlier that day.

The suit had cost Quentin £500, but he agreed to sell it to Ray for a nominal sum of £1 on the basis that he would sell it back to him for the same amount once the pandemic was over.

Ray took the suit away, and sold it on eBay for £300 to Sue. Quentin discovered this when he coincidentally saw Sue wearing the suit at a fancy-dress party.

Ray has become untraceable and Sue refuses to give the suit back to Quentin.

Advise Quentin as to his possible action against Sue for recovery of the suit.

13. Dale is a celebrity whose home is featured on a television programme. During the programme Dale displays his large collection of show-business memorabilia including his most prized possession, an Academy Award statuette (an 'Oscar') which was awarded to his favourite film-star, the late Judy Posy, in 1956.

After the programme has aired, Dale receives a telephone call from Kate, who claims to be acting for Lisa Vermicelli, the famous daughter of Judy Posy. She says that Lisa has been desperate to track down this statuette for years, ever since her mother had to sell it to pay her back-taxes. She says that Lisa is willing to pay Dale £1,000 for the statuette, but he refuses, saying that he could not bear to part with this precious possession.

The next day Kate phones Dale again, but this time claiming to be Lisa Vermicelli herself. Kate is a very good mimic, and Dale is fooled into believing that he is talking to the famous star, whom he also greatly admires. Kate (pretending to be Lisa) begs Dale to sell her the statuette, raising the offer to £2,000. Dale is so overwhelmed by her plea that he agrees to send her the statuette on receipt of her cheque.

The next day a cheque arrives by post, supposedly signed by Lisa Vermicelli, and Dale sends the statuette by courier to an address in London.

By the time Dale discovers that the cheque is a forgery, Kate has sold the statuette to Larry, who has bought it from her in good faith for £1,500. Kate has disappeared without a trace.

Advise Dale, who wishes to recover the statuette from Larry.

14. Mike went into a second-hand book shop owned by Peter. There was a book in the window in a glass case called: “The Collected Barrie-Guides,” with a sign attached saying “Not for Sale!”

Mike asked Peter if he could buy the book as he was a close friend of the author and he would like to buy it for him, as he knew that the author had lost his only copy in a fire.

Peter, who was a great fan of the author, was suspicious of this claim and asked Mike some questions about the life and works of the author. When Mike got all the answers correct, he let him buy the book for a nominal sum on condition that Mike would ask the author to visit Peter’s bookshop to thank him personally.

Having heard nothing after a week, Peter called the author’s agent, who said that there had been no such fire as Mike had described, and he did not believe that the author ever had a friend called Mike.

Peter has now discovered that Mike has sold the book to Janet for £1,000.

Advise Peter as to his possible action against Janet for recovery of the book.

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15. Frank Pike owns an antique shop in Walmington-On-Sea, specialising in military memorabilia. He displayed in his shop-window his most prized possession, a Victoria Cross won by the World War II hero, Captain Mainwaring. There was a sign under the medal which read: “Not for sale.”

One day a rogue called Walker came into the shop and enquired about buying the medal. Pike told him that it was not for sale, but Walker told him that he was Peter Mainwaring, the son of Captain Mainwaring, and that he wanted the medal to give back to his father, who had been forced to sell it in 1950 to buy food for his family.

Pike asked Walker to wait in the shop, and checked on the Internet to see if Mainwaring was still alive and had a son of Walker’s age. When this information was confirmed, he told Walker that he so admired his father that he could have the medal for £100, the price Pike had paid for it himself. Walker gave him a cheque for that amount, made out in the name of Peter Mainwaring.

The cheque was dishonoured three days later, and Pike has now discovered that Walker (who has become untraceable) has sold the medal to Sergeant Wilson for £500.

Advise Pike who wishes to recover the medal from Wilson.

16. Boris ran a shop specialising in royal and political memorabilia. In the window of the shop, he had on display the Budget briefcase, once owned by William Gladstone and used by all the Chancellors of the Exchequer from 1860 until 1965. The briefcase was marked: “For display purposes only. Not for sale.”

Jeremy went into the shop and asked to buy the briefcase for £5,000. When Boris pointed out that it was not for sale, Jeremy replied: “Surely you will let me have it. I am Philip Hammond, the current Chancellor of the Exchequer, and it is only right that the case should return with me to Downing Street.”

Boris was uncertain who the current Chancellor of the Exchequer was and asked Jeremy for proof. Jeremy produced a stolen Identity Card. It was in the name of *Hammond,* describing him as the Chancellor of the Exchequer. Although the picture on the card was of Hammond, he and Jeremy looked very similar, and Boris thought that the picture was of the man in front of him.

Boris accepted a cheque from Jeremy, and Jeremy took away the briefcase. Boris discovered the fraud when the cheque was dishonoured.

Jeremy has become untraceable, having sold the briefcase on eBay to Theresa for £10,000.

Advise Boris as to his possible action against Theresa for recovery of the briefcase.

17. “Despite the rule in *Robinson v. Harman*, unliquidated contractual damages are rarely an adequate remedy for the claimant.”

Critically analyse this statement.

18. "The general rule is that the injured person is to be fairly compensated for the damage he has sustained, neither more nor less."

per Denning L.J. in *Phillips v. Ward* (1956) 1 WLR 471 (CA)

To what extent, if at all, is this an accurate statement of the reality of the award of contractual damages?

19. ‘The latest judicial criteria for distinguishing liquidated damages from penalty clauses have created a licence for sharp practice.’

Critically discuss this statement.

20. Lord Trenton owns a large country estate in Kent on which there are four open-air tennis courts, which he rents out every year to Unman, a sports promoter, who uses the courts to stage a popular tennis championship during the first three weeks of August. The rent is £300,000 plus 10% of the ticket receipts.

During the rest of the year, Lord Trenton often uses the courts himself to play tennis with his many friends.

In May 2018, Trenton contracts with Vale Builders Ltd. to construct an indoor tennis court with stadium seating for 2,000 people at a cost of £50,000. Unman is very interested in this development as his tournament is frequently disrupted by rain, and he agrees to pay Trenton an extra £200,000 for the use of this court as well as the outside courts. Both Trenton and Unman spend money promoting the tournament with the improved facilities.

The stadium is completed in July 2018, but only has a seating capacity of 1,000. The stadium as built is worth £40,000 but it would cost a further £30,000 to rebuild it according to the contractual specifications

Unman refuses to hire the reduced sized stadium, and further insists that the rent for the four open-air courts be reduced by 50% to compensate him for the waste of time and money he has spent in promoting the competition with the indoor stadium. Trenton refuses to accept these terms, and Unman hires a different venue for his tournament.

Advise Trenton as to the basis on which his unliquidated damages will be assessed if he sues Vale Builders Ltd. for breach of contract.

21. Zebedee owns a large estate on which he has a private zoo, which is both his hobby and his passion. In order to help finance the zoo, he opens it to the public once a month, charging them £40 each to enter.

He bought a flock of Emperor penguins for £20,000 from Amanda, to be delivered on May 2nd 2018, and contracted with Bertha to build a penguin enclosure according to very specific instructions as to the size and temperature control, as required by the Royal Society for the Protection of Birds (RSPB). The contract price for the enclosure was £60,000.

The building work started on November 1st 2017, and the contract contained the following express term: **"The completion date for the contract is May 1st 2016, at which time the enclosure must be in a fit and proper state to house a flock of twenty Emperor penguins."**

On February 1st 2018, Zebedee paid Cody £1,000 in advance to organise publicity for the grand Open Day on May 5th. Great interest was generated by the publicity, and Zebedee expected to sell at least £40,000 worth of tickets.

Bertha completed the job on May 1st 2018, but on inspection it transpired that the enclosure was only two-thirds the size of that specified in the contract, and that the temperature control mechanism could not cool the area sufficiently to house Emperor penguins. The enclosure as built was worth £50,000, but it would cost an additional £30,000 to rectify the breach.

An inspector from the RSPB told Zebedee that on no account could he use the enclosure for Emperor penguins. The best he could do with it was to get a flock of Tasmanian dwarf penguins, which would not need as much space, and would not need to have the area chilled.

It would have cost Zebedee £100,000 to get such a flock, and he would have to pay Amanda a cancellation fee of £10,000.

Furthermore, even if he had ordered such a flock, it would have taken at least another five months for it to arrive, so he had to cancel the Open Day special.

Advise Zebedee as to the basis on which his damages might be assessed if he sues Bertha for breach of contract.

22. Maria, a famous singer, hopes to get a part in the opera “Musical Sounds”. The producer tells her that she stands an excellent chance of winning the lead role at the audition in a week’s time if she is in good voice.

Maria decides to take a week’s holiday to relax and prepare for the audition. She goes to the Nun’s Place Travel Agency and explains to them her particular needs. She tells them that she needs a quiet hotel where the air is clean. They offer her a holiday in the Von Trapp mansion in the Austrian Alps, a private hotel where peace is guaranteed as only ‘refined’ guests are allowed to stay, and children are not permitted at all. Maria pays £500 for her return flight and accommodation.

On arrival at the hotel, she discovers that the place is overrun with seven wild children aged between four and sixteen, who are the children of the Captain who owns the mansion. They are normally at a naval academy, but this week they are on holiday.

Maria is most distressed by the presence of these children, particularly when they all burst into her room in the middle of a thunderstorm and ask her to sing to them. After four days of shouting at them and teaching them the rudiments of singing (to guitar accompaniment) she loses her voice and decides to take the next flight back to London. This costs her an excess fee of £50.

In London, Maria attends a private clinic for emergency treatment to restore her voice. This would normally cost about £300 but because she needs it immediately it actually costs her £500. She is able to sing at the audition, but only with great difficulty and with no confidence in herself. The role is offered to another singer.

The producer Cameron Raincoat is at the audition and is so entertained by her hoarse voice that he gives her a tie-pin in the shape of a musical note and offers her the role of the Parrot in his production of the musical farce “The Vegetarian Vet” at the same pay as she would have received had she been in “Musical Sounds”.

Maria refuses the part as she thinks that it would harm her reputation as a serious singer. However, she accepts the tie-pin which turns out to be solid gold and worth £2000.

Maria claims damages from the Nun’s Place Travel Agency for her ruined holiday; the £50 excess of her flight; the cost of her medical treatment; and the lost opportunity to star in “Musical Sounds”.

How do you solve a problem like Maria’s?

Fordy v. Harwood - Court of Appeal (Civil Division) 30.03.99 (Unreported)

LORD JUSTICE STUART-SMITH

This is an appeal from a judgment of His Honour Judge Previte given at the Central London County Court on 6 March 1998 when he dismissed the plaintiff's claim for rescission of the contract or alternatively damages.

The appeal concerns two sets of pre-contract representations made in respect of a BRA Cobra motor-car, registration number ACE 356B, made by or on behalf of the defendant to the plaintiff. The car was a kit replica car which had been assembled by or on behalf of the defendant in about 1992. The defendant decided to sell it in 1994.

A replica car of this sort may consist of a number of different components. In this case it had a new steel ladder chassis and fibreglass body shell in the AC Cobra shape, which had been made by the firm called BRA. It will probably also have some authentic Cobra parts, such as the dashboard and leather seats, which will have come from a Cobra car, and a Ford V8 engine such as was produced at the time the original machines were made in about 1960. The remaining parts will come from a variety of sources, including second-hand parts, and in this particular case the rear axle was a Jaguar axle.

It is important to consider the meaning of the representations in the context of the particular vehicle and transaction which was taking place. The plaintiff's case is that he responded to an advertisement placed in a reputable vintage car publication called Classic Cars by a vintage car dealer, Mr Stanley Mann, for the October 1994 copy of that publication. The advertisement had a picture of the car and read as follows:

"From our P/X [which means part exchange] corner may we offer this BRA Cobra. Absolutely mint. All the right bits and does it go! Probably cost a fortune to build. Now for sale at £25,000."

The plaintiff travelled down from his home in Yorkshire to look at the car. He had discussions with the dealer and then with the defendant as a result of which he agreed to buy it for £19,500. It was during the conversations with the defendant that the plaintiff alleges that oral representations were made which induced him to buy the car. His case was that he thought that after the discussions with the dealer and the defendant he was buying a car that was mechanically correct and in first class condition.

He collected the car and drove it back to Yorkshire where he stored it over the winter. On taking the car out of storage he wanted to have it pass its MOT tests and it was in the course of carrying out the MOT tests that it was discovered that there was a problem with the car. The plaintiff had the car inspected by an engineering company and as a result of the report of that company he sought to reject the car, rescind the contract and obtain return of the purchase price; but the defendant refused that.

The judge's finding as to what was wrong with the car was this (at page 116 of the core bundle): "... [it] consisted of reducing the interior of the nearside wheel and reducing the shaft of the nearside hub so that the wheel was moved 12mm closer to the chassis of the car, and placing washers on each of the five stubs of the offside hub so that the offside wheel was moved 4mm away from the chassis. One effect of this modification was that the rear wheels and front wheels no longer followed the same track."

The effect of that is to be seen in a number of photographs which are in the bundle. It is plain that the modification was carried out in order to achieve a cosmetic appearance of the car so that it did not appear that one wheel was too close into the chassis and the other was too far out. It arose because the body of the car was in some way out of alignment.

The judge made the following findings in relation to the modifications. He said that the car: "...was not unroadworthy or unsafe... but that the modifications to the front wheels and nearside hub were mechanically incorrect and unacceptable. To the extent that the nearside wheel and hub had been modified... these components cannot not be said to be the correct components for the car... [and, thirdly, that] the washers [which were introduced to the off-side front wheel] cannot be said to be correct components for this car."

The judge found, however, that no representations of fact had been made in the advertisement, nor that any of the terms had become terms of the contract; he found that they were in fact a mere puff. But he went on to hold that if, contrary to his conclusion, there had been representations as to the mechanical quality of the car or its soundness then such representations were false because of the modifications which had been made. The judge also found that the plaintiff did rely on the statements made by the defendant in not having an inspection carried out and in purchasing the car. The effect of the plaintiff's evidence was that he would not have bought the car if he had been aware of the modifications.

The issue on the appeal is whether or not what was said in the advertisement and what was said by the defendant amounted to a representation and hence a misrepresentation. The judge dealt with the advertisement at page 15 of the judgment, where he said this: "The most controversial parts of the advertisement are the words `Absolutely mint. All the right bits' These words are said to be words of description. The remainder of the advertisement, namely, `...and does it go! Probably cost a fortune to build' are plainly mere puff. Considered on their own the words `absolutely mint' may suggest that what is being described is in perfect condition. For example, if used of a coin or postage stamp the words would be understood to mean that the coin or stamp is newly minted or is in as good a condition as when the coin or stamp was first minted. Here the words are used of a newly constructed replica car. The words cannot have the same meaning as when used of a coin or stamp. In my judgment, in the context of advertisements for classic cars and when used of a replica car, these words are mere puff indicating no more than that in the salesman's opinion the car has been finished to a very high standard and that it looks good."

The law in relation to mere puff is conveniently set out in Benjamin on Sale, 15th Edition, paragraph 10-005.

The editor says this: "A mere puff is, as its name implies, a statement favourably describing or extolling goods which by virtue of its vagueness or extravagance would not normally be regarded as something to be taken seriously or as grounding any form of liability. *Simplex commendatio non obligat*." (A simple recommendation does not impose liability)

Then a little later on he says; "The extent to which a statement may be so categorised depends on the degree or obviousness of its untruth, the circumstances of its making and in particular on the expertise and knowledge attributable to the person to whom it is made". And then a quotation from *Easterbrook v. Hopkins* [1918] NZLR 428 are the two sentences: "A statement made may be so preposterous in its nature that nobody could believe that anyone was misled by it. Subject to this observation the question in every case is whether or not one person has been induced to act by the misrepresentation of another."

Here it is said by Mr Croxford Q.C. for the respondent, and the judge accepted, that the statement "absolutely mint" related only to the appearance of the car, namely that it looked good. It related solely to the appearance and finish. That indeed is Mr Croxford's principal argument that, in the light of the context of the sale and purchase of a replica car, having the characteristics which I have described, that is what it must mean.

But it seems to me that the appearance of the car is obvious to anybody who looks at it. No doubt with a replica car it is important that it looks like the original. But it is not a museum piece and it is intended

to be driven and has to go. If it was intended as a mere puff as to the appearance of the car, the statement would be belied by that appearance, because in this case the car did look in very good condition; it seems to me that it is not in the nature of a mere puff at all. Admittedly, in the context of a car that is newly constructed to some extent from second-hand parts, it cannot mean that the entire car is in new or in perfect condition. But I see no reason why it should not be a representation as to the mechanical condition of the car that it is in first class condition, correctly constructed and maintained. There is no indication in the evidence that the plaintiff was only interested in the appearance of the car and not in the mechanical condition of it at all.

With regard to the second part of the advertisement - "all the right bits" - the judge said this: “I have no doubt that it would mean that as well.”

But is that all that it meant? In my judgment it must also mean that the right bits have been installed as such. Thus, if the manufacturer found that the axle was too short or too long for the car, one would not expect him, like Procrustes, to lengthen or shorten it to fit. That would not be all the right parts. That is in fact what happened in this case.

So far as the representation made by the defendant, the judge said that the gist of what he said was: "...that the car did have all the right bits and that it had been constructed to an extremely high standard. In my judgment, the use of these words in relation to a replica car and when used by a private seller to a private buyer did not amount to more than an expressions of opinion. The defendant made it clear to the plaintiff that whilst he had personally gone to great trouble to assemble authentic parts for the car, the car had been constructed by professional engineers.

The defendant showed to the plaintiff the invoices relating to the work of construction. I do not consider that anything said by the defendant to the plaintiff on this occasion amounted to a factual representation as to the quality of the mechanical construction of the car; the defendant's words were no more than his opinion of the mechanical quality."

Again, it is helpful to refer to Benjamin on Sale as to this aspect of the case. At paragraph 10-006 the author says: "Likewise, genuine statements of opinion and belief may not ground liability. They may be treated like puffs; or the matter may be one upon which the buyer is expected to form his own opinion. Much will depend on the general commercial understanding in the particular type of trade or activity at the time and place where the facts occur... Statements of value may sometimes be treated as statements of opinion; but where the value stated purports to be based on the sum paid for the object or offered for it by someone else, the statement should be regarded as being one of fact, and as such may give rise to liability. The same is true in other cases where an opinion carries the implication that there are facts to support it. The nineteenth-century reports contained various examples of assertions that horses were sound. Although such statements used sometimes to be treated as being of opinion, it is again not likely that these and similar assertions (e.g., in connection with the sale of cars) would be so readily interpreted in this way today, especially where the person making the statement is possessed of special expertise or means of knowledge. It has been said that `the word "representation" is an extremely wide term; I cannot see why one should not be making a representation when giving information or stating one's opinion or belief'."

That last sentence is a citation from *Cremdean Properties Ltd. v. Nash* (1977) 244 E.G. 547 at 551 by Lord Justice Bridge. The author continues: "Where the representor knew the article to be unsatisfactory, or can otherwise be proved not to have held the opinion which he claimed to hold, he may even be liable for deceit."

There is no question of that in this case.

A statement of opinion, if it is intended to be relied upon and acted upon, may amount to a

misrepresentation. The defendant in the course of his evidence (at page 112 of the main supplemental bundle) said:

"No, Mr Fordy accepted what I said. I felt it was, obviously, an accurate statement - and that is why I said it."

And at page 17 of his judgment the judge said this: "The defendant... said that if, at the time of sale, he had known of the problems with regard to the front wheels and nearside hub he would have told the defendant of the problem and would have offered to remedy it."

That seems to me to be entirely correct. It does not impose upon him necessarily a burden of disclosure if he had not otherwise said anything about the condition of the car. But it seems to me that he could not have represented the car in the way that he did if in fact he knew of the mechanical defect which I have indicated. That is made plain by the defendant's own evidence that he would have told the plaintiff about it.

So if he had represented the car in the way he did he would have had to qualify it by explaining what the problem was, and then it would have been for the plaintiff to have bought the car or not or to have negotiated some reduction in the price or whatever. But because the defendant was unaware of the problem he did not disclose it.

The judge said this - in effect I have summarised it already - on page 18, where he found: "... that if the statements were factual statements about the mechanical quality of the car the plaintiff did rely on those statements. [The judge accepted] the plaintiff's evidence that one of the reasons why he did not have the car inspected after driving it to his home address was because he relied upon what he would been told by the plaintiff and therefore did not have it inspected until, in accordance with the routine of his company, the car was checked... for [the] MOT test."

The other expression which the defendant used was that the car had been constructed to an extremely high standard. In the ordinary use of language that seems to me to be a statement of fact unless it is in some way qualified. It might be qualified, for example, by the statement that it was only his opinion or "I believe" or "I have been told" or something of that sort. But a statement in those terms seems to me to be a statement of fact. The judge clearly held that it was not correct, and that appears to me to be amply supported by the evidence of the defendant's expert who at page 48 of the little bundle said this:

"Q. It is fair to say, is it not, that the modifications that were carried out to this car were pretty unorthodox?"

A. It is not... How shall I say? It is not good practice."

Q. Well, your evidence, on page 59 of the bundle is, from a technical viewpoint, what was done was wholly unacceptable?"

A. Yes. From a technical viewpoint, yes"

It seems to me that the judge was in error in thinking that the advertisement was a mere puff or that the statements made by the defendant were merely expressions of opinion upon which the plaintiff could equally well have as good an opinion as himself.

For those reasons, I have come to the conclusion that this appeal should be allowed.

LORD JUSTICE BROOKE

I agree. I am adding a short judgment of my own because I have great sympathy for the defendant. In his professional life he is an investment analyser and a member of the London Stock Exchange. In his private life he is a classic car enthusiast. He has been a buyer and seller of classic cars since 1957. He has bought 10 cars since then and sold eight of them. He has had a particular interest in Aston Martins ever since he did an engineering apprenticeship at a company which put the features in the James Bond Aston Martin.

During the 1980s it became rather expensive to buy Aston Martins, and he therefore looked round to see what other avenues there might be within the classic car market to make a contribution and pursue his hobby. This led to his interest in the AC Cobra. He recalled that AC was a British company which had built a sports car and had been spotted by an American called Karel Shelby who wanted to build a car that would beat the Ferraris. Mr Shelby took an AC chassis and placed a seven-litre engine in it. Mr Harwood enthused on how, with this light chassis and light body and the big American V8 engine, the cars were incredibly fast on the straight. He recalled how one of them was said to have been stopped on the newly completed M1 doing 180 miles per hour. He said they were a car with a great charisma. They regularly beat the Ferraris on the long straights although they did not perform so well on the corners. He said they had a tremendous sort of atmosphere about them, and they built very few of them. When the classic car market took off in the 1980s, they were very much sought after and would cost up to £1 million if they had a racing history.

This is what led to the constructions of the replica kits, one of which is at the centre of these proceedings. 35 of these were made. Mr Harwood was very pleased with his car and was sad to have to sell it when he came under financial pressures in 1994. He did not know himself what had been done to the wheels when the car was put together. The judge found that he, like the plaintiff, was entirely honest and honourable in his dealings. It rings out from his evidence, which I have read, that he could not see anything wrong in describing the car as being in mint condition, or that it had been constructed to an extremely high standard.

He said during his evidence:

"What I did was, I showed my enthusiasm for the car because I am enthusiastic about the car and am still enthusiastic about the car. It took a lot of time to put it together. I was enthusiastic - you may interpret that as me trying to convince Mr Fordy, but I was showing him my enthusiasm that it had the right bits, that it had just been built, that it drove so well and so, and if that convinced Mr Fordy, well, I suppose that is true.

"My description of the car, I feel, is accurate and I was just telling him what it was."

For the reasons given by my Lord, I agree that the condition of the car was misrepresented and that the judge was wrong in dismissing this action. For the reasons he has given I, too, would allow this appeal.